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In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners*,

v.

PRINCE GEORGE CENTER, INC., ET AL., *Respondents*.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from a nation-wide class action brought in a state court on behalf of owners of buildings contaminated by asbestos. The suit against asbestos manufacturers sought the substantial costs of remediation. Class counsel settled 36,383 known potential claims for about $125 each and a requested $3.3 million in attorney's fees. Before settling, neither the class counsel nor the court inquired whether absent class members had filed actual lawsuits in other forums, which the settlement would extinguish. Consequently, they did not know that one of the class members, petitioner Prudential, for ten years had been vigorously litigating similar claims — valued at more than $110 million — in federal district court in New Jersey against the very same defendants. Counsel for those defendants knew, but kept silent.

Notice of the proposed class settlement was not sent to Prudential either at the contaminated properties at issue or at its last known and best address — its headquarters — even though Prudential's in-house counsel had informed the court of that best address in an opt-out form Prudential filed after learning of an earlier settlement class. Instead, notice was allegedly sent to five Prudential outposts that had no relationship to the contaminated properties at issue. No notice reached Prudential's headquarters or its counsel. Defense counsel finally informed Prudential of the class settlement, which ostensibly resolved Prudential's $110 million federal claims for a minuscule fraction of their worth, one day after the time for appealing it had expired.

The questions thus presented are:

1. Does the Due Process Clause's guarantee of adequate class representation in a suit for money damages require that, before settling a class action that will bind absent class members, class counsel must make a reasonable inquiry about the existence and value of the claims that the settlement purports to resolve?

2. Does the Due Process Clause mandate that notice and an opportunity to opt out of the class or the settlement must be sent to identifiable class members at their readily available addresses most likely to provide actual, timely notice of the settlement?

PARTIES TO THE PROCEEDING

The petitioners are The Prudential Insurance Company of America and two of its subsidiaries, PIC Realty Corporation and 745 Property Investors (collectively "Prudential").

The respondents are United States Gypsum Corporation, W.R. Grace & Co. — Conn., Asbestospray Corporation and United States Mineral Products Company (the relevant defendants in the class action), as well as Prince George Center, Inc. and MBL Life Assurance Corporation (the named class plaintiffs).

STATEMENT PURSUANT TO RULE 29.6

Prudential is a New Jersey-headquartered mutual insurance company. To the extent it is required to respond to Supreme Court Rule 29.6, Prudential states that it does not have any parent companies. Prudential has numerous wholly owned subsidiaries. The following are Prudential's non-wholly owned subsidiaries:

1. 745 Property Investments is owned 99% by Prudential and 1% by individual investors.

2. China Distri-Park Limited is 50% owned by PRICOA China (Warehouse) Limited and 50% owned by Trammell Crow International.

3. PRUCO, Inc. owns 1 share (<1%) of PruServicos Participacaoes, S.A.

4. Prudential Mortgage Asset Corporation II is 50% owned by Prudential and 50% owned by Inter-Atlantic Investment Advisors, Inc.

5. Prudential-Mitsui Trust Investments, Ltd is 50% owned by Prudential and 50% Mitsui Trust Investments, Ltd.

6. Prudential of America Life Insurance Company (Canada) is 75% owned by Prudential and 25% owned by 884904 Ontario, Inc.

7. Prudential Seguros S.A. is 99.99% owned by Prudential and .01% owned by Santiago Nicholson.

8. Prudential Towarzystwo Ubezpieczen na Zycie Spolka Akcyjna is 99.9998% owned by Prudential and .0001% owned by Ira Kleinman and .0001% owned by Tim Feige.

9. Prudential Private Capital Management, Ltd. (Cayman Islands) is a Private Equity Fund offering high net-worth investors the opportunity to invest in ARGUS, PRICOA, PAPEII, and the Prudential Brazilian Fund.

10. Preferred Coastal Realty, Inc. is 80% owned by The Prudential Real Estate Financial Services of America, Inc. and 20% owned by Alex Cramer.

11. Prudential Direct Insurance Agency of Ohio, Inc. is 90% owned by Prudential Direct, Inc. and 10% owned by Jeffrey Hess.

12. PBML Custodian Limited is 99.60% owned by Prudential Securities Group, Inc. and Prudential-Bache Securities (Australia) Limited, Bache Nominees Ltd., Corcarr Nominees Pty Limited, and Divsplit Nominees Pty Limited each own 10%.

13. Prudential-Bache International (Hong Kong) Limited is 50% owned by Prudential Securities Group, Inc. and 50% owned by Desmond Liu.

14. Prudential Commodities de Mexico, S, de R.L. de CV is 99.96% owned by Commodity Administrative Services, Inc. and .04% owned by Mexico Commodity Sourcing Corp.

15. Prudential-Bache Finance (Hong Kong) Limited is 50% owned by Prudential-Bache International (Hong Kong) Limited and 50% owned by Desmond Liu.

16. Prudential-Bache Futures (Hong Kong) Limited is 99.93% owned by Prudential-Bache International (Hong Kong) Limited and .07% owned by Desmond Liu.

17. Prudential-Bache Nominees (Hong Kong) Limited is 99.94% owned by Prudential-Bache International (Hong Kong) Limited and .06% owned by Desmond Liu.

18. Prudential-Bache Securities (Hong Kong) Limited is 99.99% owned by Prudential-Bache International (Hong Kong by Desmond Liu.

19. Prudential-Bache Metals GmbH & Co. KG is 98% owned by Prudential-Bache Securities (Germany) Inc. and 2% owned by Prudential-Bache Management GmbH.

20. Corcarr Nominees Pty Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% Divsplit Nominees Pty Limited.

21. Prudential-Bache Funds Management Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% by Corcarr Nominees Pty Limited.

22. Divsplit Nominees Pty Limited is 75% owned by Prudential-Bache Securities (Australia) Limited and 25% by Corcarr Nominees Pty Limited.

23. PruBache Nominees Pty Limited is 50% owned by Prudential-Bache Securities (Australia) Limited and 50% by Corcarr Nominees Pty Limited.

24. Bache & Co. S.A. de C.V. (Mexico) is 96% owned by Prudential Securities Incorporated, 3% owned by Thomas G. Sheridan and 1% owned by William L. Custard.

25. Lapine Holding Company is 66.7% owned by Prudential Securities, Inc. 28.3% owned by Kyocera Corp. and 5% owned by Kyocera (Hong Kong) Ltd.

26. The Prudential owns 6 shares (100%) of preferred stock in Prudential Timber Investments, Inc.

27. PAMA (Indonesia) Limited is 75% owned by Prudential Asset Management Asia Limited (BVI), 15% owned by BDNI and 10% by International Finance Corporation.

28. PAMA Ventura Indonesia is 65% owned by Prudential Asset Management Asia Limited (BVI), 20% owned by BDNI and 15% by International Finance Corporation.

29. Asian Infrastructure Mezzanine Capital Management Company Limited is 85% owned by Prudential Asian

Infrastructure Investors Limited (BVI) and 15% owned by Asian D[illegible]opment Bank.

PIC Realty Corporation is a wholly owned subsidiary of Prudential.

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PETITION FOR A WRIT OF CERTIORARI

The Prudential Insurance Companies of America, *et al.* respectfully petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is published at 704 A.2d 141. App. 2a. The opinion of the Court of Common Pleas, Philadelphia County, Civil Division is published at 33 Phila. 151 (1997). App. 21a. The orders of the Court of Common Pleas refusing to exclude Prudential from the class are unpublished. App. 67a, 68a. The order of the Supreme Court of Pennsylvania denying the petition for allowance of appeal is unpublished. App. 1a.

JURISDICTION

The order of the Pennsylvania Supreme Court denying leave to appeal was entered on December 8, 1998. On February 26, 1999, Justice Souter granted petitioners an enlargement of time to file this petition to and including April 22, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT

In recent decisions, the Court has permitted state courts to entertain nation-wide class actions, provided that they adequately protect the federal constitutional rights of absent class members, including the rights to "adequate representation" and the "best practicable notice." See *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Although the Court has expressed a "continuing interest" in elucidating the constitutional constraints on class action settlements that eliminate the damage claims of absent class members — granting writs of certiorari twice in recent years to

address the issue ((*Adams* v. *Robertson*, 520 U.S. 83, 92 n.6 (1997); see also *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994))) — it has not yet been able to do so.[1] This case presents an ideal opportunity for the Court to give content to the constitutional commands that absent class members receive "adequate representation" and the "best notice practicable" in suits that dispose of their damage claims.

This Petition involves two separate asbestos-property damage suits: (1) a class action in Pennsylvania state court from which this petition arises and (2) an action filed by Prudential to vindicate its own rights in the United States District Court for the District of New Jersey. Defendants have averred that there are eight buildings common to both actions. App. 28a.

1. ***The Pennsylvania Class Action.*** The Pennsylvania class action was filed in May 1986 against more than two dozen former manufacturers of asbestos-containing materials. App. 21a-22a. In April 1992, a class was certified, defined as:

> "Private owners of building(s) * * * which were leased or subleased in whole or part to the Federal Government or any agency, department or unit thereof, on or after May 30, 1986, in which buildings, asbestos-containing material is or was present." *Id.* at 22a.

No notice concerning that 1992 class certification was mailed to potential class members.

2. ***The New Jersey Action.*** In October 1987, having received no notice of the pendency of the Pennsylvania class action, Prudential filed suit in federal district court in New Jersey against seven former asbestos manufacturers. The suit sought to recover several hundred million dollars Prudential spent to abate defendants' asbestos in 61 buildings it owned throughout the United States. Prudential's claims were based on a federal statute, as well as New Jersey common and statutory law. The current active defendants in the New Jersey action are United States Gypsum Company, W.R. Grace & Co. — Conn., Asbestospray

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[1] The writs of certiorari in both cases were dismissed as improvidently granted. See *Adams* v. *Robertson*, 520 U.S. 83 (1997); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994).

Corporation and United States Mineral Products Company (collectively "the active defendants"). The defense counsel representing U.S. Gypsum and Grace in the New Jersey action are the same counsel who represent those same defendants in the Pennsylvania class action.

For nine years, the active defendants intensely litigated the New Jersey action without ever disclosing the existence of the Pennsylvania class action in which they also were defendants. Prudential has spent over $15 million in legal fees and litigation expenses prosecuting the New Jersey action.

3. ***The 1995 Settlement In The Pennsylvania Class Action.*** By early 1995, all the defendants in the Pennsylvania class action — except the four active defendants in Prudential's New Jersey case — had agreed to settle for $3.8 million. In February 1995, the Court of Common Pleas (1) decertified the class it had certified in April 1992, (2) certified an opt-out "settlement class" involving the settling defendants, and (3) conditionally certified a trial class involving the four non-settling active defendants. App. 23a-25a. Notice of certification of the class and settlement was directed to what defendants have described as "merely a hodgepodge of [incomplete] lists" of 36,383 potential class members, obtained by class counsel from the federal government pursuant to a Freedom of Information Act (FOIA) request for the addresses of buildings in which the government or its agencies lease space. Certain Defs. Supp. Mem. of Law In Support of Defs. Motion for "Opt-In" Procedure, at 9 (Jan. 22, 1993); App. 26a. Although the list included addresses of seven outlying Prudential offices, none had any connection to the contaminated properties at issue. None of these offices has any record of directly receiving notice. However, a copy of the notice was indirectly received by a Prudential office in Dallas, Texas — an office that was not on the notice list. The notice had been forwarded by an unrelated third party.

The Dallas office sent that notice to Prudential's legal department at its headquarters in Newark, New Jersey. A lawyer in the law department promptly filed with the Pennsylvania court the accompanying form excluding Prudential from the settlement class. On the exclusion form, Prudential identified Steven A. Lauer, Assistant General Counsel, as its representative agent and, in the space provided for the putative class member's address,

typed: "Law Department - 14th Floor, 751 Broad Street, Newark, New Jersey 07102-3777." App. 59a-60a. Prudential's counsel expressly noted on the form that the company acknowledged receipt, "but not service of," the notice (*id.* at 60a), because the only notice Prudential had received had not been addressed to it but instead had been forwarded by a third party.[2]

4. ***Continued Litigation In The New Jersey Action.*** Meanwhile, litigation of the New Jersey action was continuing. In December, 1995 Prudential moved for immediate separate trial of its claims relating to nine representative buildings. The active defendants opposed the motion. Pursuant to the parties' compromise, in March 1996 the federal court entered an order establishing a final pretrial schedule. *Id.* at 25a. Under this agreed order, Prudential voluntarily dismissed claims for over $30 million, reducing to 18 the number of buildings for which it would seek to recover remediation costs; and in exchange, the parties agreed to a trial by December 1996 on all issues pertaining to those 18 buildings. Aff. of Prudential's Counsel in Support of Petition, at 3 (Sept. 30, 1996).

Before negotiating that pretrial order and dismissal of Prudential's claims, the active defendants did not disclose that they already had agreed to settle the Pennsylvania class action on terms that they would later contend extinguished Prudential's claims as to 8 of the 18 remaining buildings.

5. ***The 1996 Global Settlement In The Pennsylvania Class Action And The Notice.*** By March 1996, the active defendants had arranged a settlement of the Pennsylvania class action under which they would pay a total of $7.8 million — from which class counsel are seeking $3.3 million in fees — in exchange for extinguishing all the related claims of all the class members, including unidentified claims class members were pursuing in separate lawsuits. In negotiating that settlement, defense counsel never disclosed the existence of the action Prudential — a putative class member — had been litigating against the defendants for nine years in New Jersey. And in accepting the settlement, class

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[2] Also in May 1995, a follow-up letter from Mr. Lauer to the Pennsylvania court and class counsel was prepared but not sent. App. 61a-62a.

counsel similarly did not ask defendants about, or investigate independently, the existence or value of other pending lawsuits that the settlement would extinguish. Brief of Trial Class Reps., at 1 n.1 (Superior Court Sept. 27, 1997). Indeed, lead class counsel later admitted that, when he agreed to settle the class's claims, he had no knowledge of Prudential's substantial claims or even that Prudential had a pending action. *Id.* Accordingly, in evaluating the fairness and adequacy of the proposed settlement, the Court of Common Pleas, too, lacked any knowledge of the existence or value of the claims the settlement was compromising. App. 53a.

The settlement included a customary "blow-out" provision, which allowed the defendants to avoid the settlement if 500 or more putative class members opted out. *Id.* at 10a. In February 1996, after entering a final class certification order, the Court of Common Pleas directed that notices of the proposed settlement be sent, along with forms permitting opt-out from this new settlement class, to the addresses class counsel had obtained from his FOIA request. *Id.* at 27a.[3] No effort was made to update that list with the address information contained in the exclusion forms filed with the court by the 356 class members who had opted out of the previous settlement class. Nor was any effort made to ensure that notice to the many corporations on the list was directed to their headquarters, general counsels, or responsible agents — the identities and addresses of which are readily available in numerous public directories.

The name "Prudential" or "Pru" appeared on the notice list six times, and there is one entry for "745 Property." Answer of Trial Class Plaintiffs to Petition of Prudential, Exh. B (Oct. 29, 1996). No defendant disclosed that a letter directed to those addresses for Prudential was far less likely to achieve actual notice than a letter directed to the address either of Prudential's headquarters or of its counsel in the New Jersey action. Defendants maintained silence even though they received the draft notice list well in advance of the mailing and even though they had committed in the settlement agreement to "cooperate in good faith, use their best efforts, and take all steps necessary to implement and effectuate" the provisions of the agreement, including its

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[3] In addition, the court approved publication of an abbreviated notice in eight newspapers and on the internet. App. 27a.

stipulation that "the class should receive notice." Settlement Agreements ("Notice and Approval of Settlement").

As a result, no notice was sent to Prudential at any of the buildings at issue in the New Jersey action. App. 5a, 6a. No notice was sent to Prudential's headquarters. *Id.* at 15a. And no notice was sent to Prudential's designated representative and counsel, Steven Lauer, who had identified himself as Prudential's agent in the opt-out form he filed with the court in 1995. Instead, seven notices were mailed to addresses of outlying Prudential buildings located in Boston, Chicago, Portland, Los Angeles, and Southfield, Michigan. The notices sent to Southfield and Los Angeles were returned by the Postal Service as "undeliverable." *Id.* at 6a. The record contains no evidence that any effort was made to redirect these notices to a correct address. And neither the Boston, Chicago, or Portland offices to which notice purportedly was sent, nor any other Prudential offices, have any record of receiving it. Aff. of Steven Lauer in Support of Petition, at 6-7 (Sept. 30, 1996).

While defense counsel did nothing to ensure that Prudential would receive notice of the settlement in time to opt out of it, they took exquisite care to ensure that the settlement would dispose of Prudential's claims in the New Jersey action. Defense counsel actively participated in drafting the notice and judgment, both of which emphasized that the settlement would bind absent class members who were litigating similar claims in other forums. Thus, Paragraph 24 of the notice explicitly states that class members (like Prudential) who "are already party to another lawsuit against [any of the defendants] * * * must nonetheless file an exclusion request." App. 27a-28a. The judgment likewise was crafted to bar all claims currently in litigation. *Id.* at 72a-73a.

The opt-out period for the 1996 class settlement with the active defendants in the Pennsylvania action ended on July 8, 1996. Prudential did not file an opt-out form because no responsible agent had received notice of the settlement. Shortly after the opt-out period closed, defense counsel received the list of the 289 putative class members who had filed opt-out forms. The next week, with the opt-out list in hand — which did not include Prudential — defendants filed a brief in support of the proposed settlement. In it, they expressly represented to the Pennsylvania

court that the damage claims of the class members that the settlement would resolve were likely "nominal." Mem. of Law of Settling Defs. In Support of Final Approval of Their Settlement Agreements, at 12 (July 19, 1996). The active defendants made that representation despite their knowledge that Prudential's claims in the New Jersey action for the eight common buildings alone exceeded $110 million. Their filing representing that the settlement was fair made no mention of the New Jersey action at all.

On August 13, 1996, having neither requested nor received any information about the existence or value of all the claims the global settlement purported to extinguish, the Pennsylvania court entered a Final Order and Judgment approving it. App. 53a-54a, 69a-76a.

6. ***Defendants' "Gotcha" Letter In The New Jersey Action.*** Exactly one day after the appeal period expired in Pennsylvania, at 5:02 p.m. on Friday, September 13, 1996, counsel for U.S. Gypsum and Grace faxed a letter to Prudential's counsel in the New Jersey action announcing the Pennsylvania class action settlement and the defendants' contention that it had extinguished Prudential's $110 million claims in the New Jersey action for the costs of remediating the eight common buildings. App. 77a-78a. Having received actual notice of the new class certification and settlement for the first time, Prudential's counsel promptly attempted to file an opt-out on September 20, 1996. *Id.* at 67a.

7. ***Prudential's Petitions And The Opinions Below.*** On September 30, 1996, Prudential petitioned the Pennsylvania Court of Common Pleas for a declaration that it was not a class member or that its September 20, 1996 opt-out was timely. In the alternative, Prudential argued that the notice and settlement violated its federal constitutional right to due process. Prudential challenged the constitutional adequacy of both the notice and the representation class counsel had provided. Pet. for Declaration That Prudential Is Not A Class Member Or, Alternatively, For *Nunc Pro Tunc* Ruling That Prudential's September 20, 1996 Opt-Out Filing Was Timely, at 23-29 (Sept. 30, 1996). Prudential acknowledged that it "kn[ew] so little about what has happened in the Class Action over the last decade" that it was unable to assess the adequacy of the representation in its totality pending fuller development of the facts. *Id.* at 28. But it argued that

> "any class representation which did not at least *take into account* the unique nature of its claim — a multi-million dollar suit which had already survived several motions to dismiss and is within a few months of trial — would fail the tests of [two state cases] * * *, both of which found inadequate representation." *Ibid.* (emphasis in original).

Expressly invoking the federal Due Process Clause, Prudential also argued that this Court in *Shutts*, *supra*, "held that either inadequate notice *or* inadequate representation deprive a class action plaintiff of due process." *Ibid.* (emphasis in original). Because it lacked full information concerning class counsel's conduct, and the court had not yet ruled on its motion to be excluded from the class or for its opt-out to be deemed timely, however, Prudential explicitly "reserve[d]" — twice — its right to make further arguments "concerning the issue of adequate representation." *Ibid.*; *id.* at 29.

On November 27, 1996, the court denied Prudential's petition without opinion. App. 67a. Prudential promptly petitioned for rehearing, reasserting, among other points, its constitutional challenges to the adequacy of both notice and representation. Brief of Prudential In Support of Petition for Reconsideration and Clarification (Dec. 10, 1996). With respect to the latter, Prudential again argued that class counsel's failure to "take[] into account" "Prudential's $300 million claim" in the New Jersey action prior to settling "is *prima facie* indication of inadequate representation." *Id.* at 28. Prudential noted again, however, that because it "was privy to virtually nothing that transpired in this case over the last decade, it needs discovery on the issue of the inadequacy of * * * representation." *Id.* at 29. "Among the items to be addressed would be how class counsel evaluated Prudential's claims" and defendants' "chances of avoiding a judgment" in the New Jersey litigation. *Id.* at 29 n. 10.

The Court of Common Pleas denied Prudential's motion for reconsideration and did not allow discovery. App. 68a. Several months later, after Prudential appealed to the appellate division of the Superior Court, the trial judge filed an opinion in support of his November order. *Id.* at 21a-66a. He addressed, but rejected, Prudential's due process arguments concerning both notice and

adequacy of representation. *Id.* at 54a-55a. The judge did not suggest that the representation issue had not been timely raised.

On November 21, 1997, a three-judge panel of the appellate court affirmed. *Id.* at 2a-20a. While it acknowledged that Prudential had raised a due process challenge to the adequacy of class counsel's representation, it refused to address that issue, mistakenly stating that the issue had been raised only in Prudential's petition for reconsideration. *Id.* at 7a-8a. The appellate court addressed but rejected Prudential's challenge to the constitutional adequacy of the notice (*id.* at 14a-18a), opining that Prudential's lack of awareness of the settlement was its own fault because it had "fail[ed] to monitor this litigation" (*id.* at 11a). It dismissed Prudential's argument that notice had not been the "best practicable" with a declaration that, under Pennsylvania law, Prudential was deemed to have received actual notice, because a letter had been mailed to its outposts. *Id.* at 15a. The appellate court also found that it was "eminently practical" for class counsel to use the old notice list without checking for better addresses in the more recent opt-out forms, reasoning that those opt-out forms had been filed by persons for whom the prior notice effort must have been adequate. *Id.* at 17a. On December 8, 1998 the Pennsylvania Supreme Court denied Prudential's petition for allowance of appeal to that court. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

I. THE ENORMOUS GROWTH OF NATION-WIDE CLASS ACTIONS IN STATE COURTS MAKES IT VITAL TO DEFINE THE CONSTITUTIONAL PROTECTIONS AGAINST UNFAIR OR COLLUSIVE SETTLEMENTS

Fleeing the increasingly skeptical environment of the federal courts, which have been faithfully employing Rule 23 to curb class action abuses,[4] class action lawyers are flooding the state courts, where state class action rules may receive less protective

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[4] See, *e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir. 1995).

interpretations.[5] Thus, commentators have reported a "doubling or tripling over the past several years of the number of putative class actions" filed in state courts. D. HENSLER, J. GROSS, E. MOLLER & N. PACE, PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997).

But in the absence of sufficiently specific constitutional constraints, the proliferation of state class actions has heralded a proliferation of abuses. See, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366-1382 (1995). The resulting chaos in the state courts is manifest. Widespread confusion and laxity reigns concerning the content of the Due Process protections to which absent class members are entitled, especially in the context of settlement. Collusion between class counsel and defendants seeking to buy peace is rampant. See *id.* at 1349-50, 1370-72.[6]

The desperate need for articulated standards constraining the conduct of class counsel in their representation of absent class

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[5] See, *e.g.*, *Class Action Lawsuits, 1998: Hearing On Mass Torts & Class Actions Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1998 WL 122533 (1998) (statement of John W. Martin); *Class Action Lawsuits, 1997: Hearing Before the Subcomm. on Admin. Oversight & The Courts of the Senate Judiciary Comm.*, 105th Cong., 1997 WL 680229, at *10 (Oct. 30, 1997) (statement of Lewis H. Goldfarb) (describing the "giant sucking sound" created by the "sudden, massive shift of class action lawsuits from the Federal Courts to local courts in certain southern states that have become class action havens"); Elizabeth Cabraser, *Trends and Developments in Mass Torts and Class Actions in Year One of the Post-Amchem Era*, SD 15S ALI-ABA 77, 98, 102 (1998) ("it is increasingly likely that the state courts will become the exclusive fora for the nationwide assertion of" certain types of class actions).

[6] See also, *e.g.*, *Class Action Lawsuits, 1997: Hearing Before the Subcomm. on Admin. Oversight & The Courts of the Senate Judiciary Comm.*, 105th Cong., 1997 WL 683686 (Oct. 30, 1997) (statement of John C. Coffee, Jr.); *id.* at 1997 WL 680229 (statement of Lewis H. Goldfarb); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" In Class Actions*, 73 N.Y.U. L. REV. 765, 775 (1998); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class & Derivative Actions*, 86 COLUM. L. REV. 669, 714 & n.121 (1986).

members is widely recognized. In one notorious recent example, class counsel settled an Alabama state court class action by depositors against the Bank of Boston for a maximum award of $9 per class member, plus $8 million in attorneys' fees, which were actually *debited* from the bank accounts of the putative class members, resulting in net losses for many of them. See *Kamilewicz* v. *Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, Wood, JJ., dissenting from denial of reh'g en banc), cert. denied, 520 U.S. 1204 (1997)). Outraged class members sued their "champions" from the state case for malpractice, but the federal courts dismissed for lack of jurisdiction. See *id.* at 1349.

Yet another form of class action abuse is the willful use of sloppy and outdated address lists. Too often, the failure to correct and update such lists is a convenient means by which class counsel and defense counsel protect their agreement from a deal-breaking number of opt-outs. The effect of that practice is to nullify the constitutional right to opt out of class action suits for money damages, recognized by the Court in *Shutts, supra*.

Endeavoring to address such state court class action abuses in the securities class action context, Congress conferred exclusive federal jurisdiction over certain securities suits against "listed" public companies. See *Securities Litigation Uniform Standards Act*, Pub. L. No. 105-353, 112 Stat. 3227 (Nov. 3, 1998) (codified as amended in sections of 15 U.S.C. §§ 77, 78, 80). But such Congressional preemption of the state courts is not always possible, nor in our federal system is it generally appropriate. Accordingly, there remains a need for this Court to ensure that absent class members in state cases will receive due process, by clarifying the applicable constitutional protections.

The Pennsylvania court's conclusions in this case — that class counsel had no duty to investigate the existence and value of the claims he was settling, and that notice to addresses known by the trial court and all counsel not to be the actual or best addresses of class members who they knew were likely to opt out — graphically illustrate the urgent need for definition of the rights to adequate representation and notice. Absent such guidance, there is an unacceptable risk that the state class action will become — as it

was in this case — a tool for cunningly destroying, rather than for rigorously vindicating, the rights of absent class members.

As we discuss in further detail below, review of the decision below is imperative. *First*, although it has long been settled that the Due Process Clause demands "adequate" representation of absent class members (*Shutts*, 472 U.S. at 812; *Hansberry* v. *Lee*, 311 U.S. 32, 42-43, 45 (1940)), and the Court has recognized in the federal context that adequate representation entails competent performance by class counsel (see *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982); *Amchem Prods.* v. *Windsor*, 117 S. Ct. 2231, 2251 n.20 (1997)), the Court has yet to articulate any standards for gauging the adequacy of the performance of class counsel.[7] As the results below demonstrate, the absence of such authority has led to confusion and error among state courts that simply do not appreciate the nature of the due process interests at stake. The need for such standards is especially urgent in the context of settlement, where inequitable "bargain[s]" too often are "proffered for [a court's] approval without benefit of adversarial investigation" (*Amchem*, 117 S. Ct. at 2235), the interests of "[a]bsent class members are * * * ignored," and inequitable pay-offs that benefit class counsel at the expense of their nominal clients are "crammed down the throats of objectors" (*Kamilewicz*, 100 F.3d at 1351-1352 (Easterbrook, J., dissenting from denial of reh'g en banc)). Unless this Court articulates class counsel's duty to investigate and disclose the existence and value of the claims they seek to settle, state courts will continue unwittingly to approve abysmally unfair settlements that extinguish absent class members' claims for fractions of their worth.

Second, although the Court has emphatically declared that identifiable class members are entitled to the "best practicable" notice (*Shutts*, 472 U.S. at 812), there is a pressing need to translate this general policy into specific guidance. The important issue is whether state courts and counsel seeking to settle the

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[7] The Court frequently has addressed the adequacy of representation provided to absent class members by class *representatives*. See, *e.g.*, *Amchem*, 117 S. Ct. at 2250-2251; *East Texas Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977); see also *Hansberry*, 311 U.S. at 42-43, 45. But the Court has never addressed the requirement of adequacy as it applies to class *counsel*.

claims of identified absent class members are obliged to select the notice procedure most likely to *give actual notice* by using or ascertaining the class members' *best, current addresses*. The issue is of overwhelming importance to courts and litigants, since the issues arise in virtually every class action. Lacking instruction from this Court, the decisions of the lower federal and state courts interpreting the "best practicable notice" mandate are in chaotic disarray. The result too often, as in this case, is that the constitutional right of identified class members to receive notice is sacrificed to class counsel's self-interested motive to minimize costs — and reduce the likelihood of a deal-breaking number of opt-outs — by commissioning a mass mailing to outdated and inaccurate addresses. It is highly important for this Court to confirm that the constitutional requirement that identified class members receive the best practicable notice, like the Rule 23 notice requirement, cannot "be tailored to fit the pocketbooks" of class counsel. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

II. DUE PROCESS DEMANDS REASONABLE INQUIRY INTO THE EXISTENCE AND VALUE OF ABSENT CLASS MEMBERS' CLAIMS

A. This Is A Troubling Issue That Recurs In State Court Class Action Litigation

The Court has repeatedly held, although only in general terms, that the Due Process Clause requires that absent class members receive "adequate" representation. *Shutts*, 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45); see also *Richards* v. *Jefferson County*, 517 U.S. 793, 800-801 (1996). Like other protections of absentees, that constitutional requirement demands "undiluted, even heightened, attention in the settlement context." *Amchem*, 117 S. Ct. at 2248. See also *Matsushita*, 516 U.S. at 399 (Ginsburg, J., concurring in part and dissenting in part) ("stress[ing] * * * the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement").

The problem, though, is that the Court has not yet given that broad concept the kind of hard-edged content that prevents lower

courts from tolerating shoddy representation by class counsel and acquiescing in collusive settlements, to the detriment of absent class members. What happened here is anything but unique.

Defendants have a powerful incentive in *every* class action to endeavor to resolve, through a global settlement, all similar claims pending against them in *every* forum. And naturally, defendants try to negotiate that global settlement at the lowest possible cost. In a truly adversarial system, that incentive of defendants to use a state-court class action settlement to eliminate cheaply the viable claims class members are pursuing in other forums would be counterbalanced by plaintiffs' counsel's incentive to obtain the highest possible settlement for his clients. Properly motivated plaintiffs' counsel therefore would increase his negotiating power by arraying his own ammunition — amassing evidence of the high value of *all* the class members' claims — in support of a high settlement demand.

The problem, as a host of commentators and courts have observed, is that the class action procedure too frequently is *not* truly adversarial. See, *e.g.*, John C. Coffee, Jr., *Class Actions: Interjurisdictional Warfare*, 218 N.Y.L.J. 5 (Sept. 25, 1997); sources cited *supra* n. 6. Motivated by the prospect of receiving even *higher* fees if he agrees to sell his clients' claims cheaply, class counsel often declines to inquire into the existence and/or value of claims in other forums that the settlement would extinguish. Cf. RAND STUDY, *supra*, at 24 (the willingness of class counsel *not* to engage in discovery — which could readily reveal the existence of similar, valuable pending claims — is frequently a *quid pro quo* for a settlement with "attractive fees").

Often, as in this case, the most critical play in the game is the failure of the state court to which the global settlement is proffered to inquire about the claims it would extinguish. For why else would a state court approve the bargain basement sale of the valuable claims of absent class members, unless it had "never been apprised by the parties of the existence of the first proceeding"?

Interjurisdictional Warfare, *supra*, at 5.[8] The scene is replayed again and again.[9] Plaintiffs' counsel declines to investigate, for to do so may reveal the inadequacy and unfairness of the settlement to which he has agreed, scuttle the deal and deprive him of his (often disproportionately substantial) fees. Defense counsel declines to disclose, since disclosure would alert the court and class counsel to the need for actual notice to (and hence make possible opt-outs by) the class members whose separate claims defense counsel is trying to bar by *res judicata*. As Judge Easterbrook has put it:

> "The [class] lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information."

Kamilewicz, 100 F.3d at 1352. See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

The end product, in a nutshell, is this case. Plaintiffs, having expended millions of dollars and years of effort pursuing their substantial claims, are suddenly informed by defendants that those claims have been unalterably extinguished for a small fraction of a penny on the dollar, in a settlement of which they had received no notice, by class counsel who, while purporting to protect their interests, professes ignorance of their claims.

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[8] Cf. FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.29, at 333 (1995) ("In mass tort litigation, collecting information about past, pending, and future claims is integral to reviewing settlement."); RAND STUDY, *supra*, at 26 ("virtually all of those * * * interviewed agreed that a key factor facilitating questionable settlements is that judges are not consistently exercising their responsibility to scrutinize" them).

[9] See, *e.g.*, *Walter Johnson* v. *Norwest Fin. Alabama, Inc.*, No. CV-93-PT-0962-S, Mem. Op. at 2-3 (N.D. Ala. Dec. 9, 1996) (defendants had secretly brokered an Alabama state court settlement in a copy-cat class action without informing either court until a tentative agreement had been reached); *In re Federal Skywalk Cases*, 97 F.R.D. 370 (W.D. Mo. 1983).

B. The Pennsylvania Court's Decision Is Irreconcilable With Decisions Of The Lower Federal Courts; And Guidance By This Court Is Urgently Required

1. The Pennsylvania Court of Common Pleas rejected Prudential's argument that, by settling its claims for a nominal sum without first inquiring into their "nature or magnitude" — indeed, with no cognizance of their existence — class counsel provided patently inadequate representation. App. 54a-55a. The court reasoned, illogically, that because in the court's view the "defendants had no duty to advise plaintiffs' class counsel" of lawsuits class members were pursuing against the defendant in other forums, class counsel did not breach his own duty by failing to inquire into the existence of such suits before compromising them away. *Id.* The appellate court affirmed. App. 7a-8a. The Pennsylvania courts' interpretation of the Due Process Clause is irreconcilable with decisions of the lower federal courts.

Most notably, it conflicts directly with the recent decision by the Ninth Circuit in *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (1997) (on remand from *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367 (1996)). In that case, Delaware counsel representing a state-court class of shareholders entered a global settlement of the shareholders' state and federal claims. This Court held that the Delaware court's judgment settling the class action, which included the federal claims over which the state court had no jurisdiction, could not, for that reason alone, be denied full faith and credit by other courts. *Matsushita*, 516 U.S. 367. In her concurrence, however, Justice Ginsburg pointedly observed that the due process challenge to the adequacy of representation — including the argument that class counsel in the state case had "undervalued the federal claims" (*id.* at 398) — "remain[s] open for airing on remand"(*id.* at 399).

Taking this cue, the Ninth Circuit thereafter concluded that the judgment had been entered without due process. The Ninth Circuit condemned the flagrantly inadequate representation class counsel had rendered by, among other things, settling the federal claims "at a bargain basement price" without first accurately ascertaining the value of the claims the putative class members were pursuing in a federal court. 126 F.3d at 1249. In stark contrast to the Pennsylvania court below, the Ninth Circuit concluded that, by

"completely fail[ing] to investigate or develop their federal claims and basically 'roll[ing] over' during settlement negotiations," class counsel engaged in conduct that "fell far short of the representation that due process requires." *Id.* at 1251.[10]

2. It is imperative that the Court confirm that such passive participation by class counsel in defendants' efforts to extinguish the valuable claims of absent class members violates the right to "adequate" representation. The Court has recognized the constitutional requirement that absent class members receive adequate representation "at all times" (*Shutts*, 472 U.S. at 812), and, in the Rule 23 context, that adequate representation includes competent performance by class counsel (*Amchem*, 117 S. Ct. at 2251 n.20; *Falcon*, 457 U.S. at 157 n.13). Monitoring by the courts of the adequacy of representation is especially important because absent class members are, by definition, not present and therefore unable to perform the task. But the Court has never articulated any specific standards for class counsel's performance.

It is an issue about which the lower courts have evinced marked confusion. A majority of courts eschew the ethics rules by which attorneys ordinarily are bound, declaring them inapplicable to the relationship between class counsel and absent class members. See, *e.g.*, Susan P. Koniak, *Through The Looking Glass Of Ethics And The Wrong With Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 15 & n. 53 (1995) (citing cases); *In re General Motors*, 55 F.3d at 801 (observing that the adequacy of representation in "class actions cannot be analyzed in the same

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[10] The Pennsylvania courts' decision also conflicts with *Romstadt* v. *Apple Computer, Inc.*, 948 F. Supp. 701, 703, 708 (N.D. Ohio 1996). There, as in *Epstein*, the federal court held that the failure by defense counsel and class counsel to disclose to a state court the existence of pending federal claims that would be resolved by a proffered settlement deprives putative class members of due process. Indeed, in contrast to the Pennsylvania courts, the *Romstadt* court insisted that defendants *do* have a duty to advise the trial court to which they are presenting a settlement of a class member's pending separate lawsuit. *Compare* App. 54a-55a *with* 948 F. Supp. at 704-706. The court explained that the nondisclosure of such critical information ultimately deprives the state judge "of the ability to inquire about the adequacy of representation" and "the reasonableness and fairness of the terms of settlement." *Id.* at 705-706.

[ethics] framework as conventional bipolar litigation"). Commentators have decried the absence of any clear standards to fill the void. See, *e.g.*, *Through The Looking Glass*, *supra*, at 15 (in class actions, "the standard used by courts is not only lower than the malpractice standard ordinary lawyers are held to, the standard is nonexistent"); Susan P. Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Prods.*, 80 CORNELL L. REV. 1045 (1995); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 316-317 (1985). They observe that courts often tolerate conduct by class counsel in brokering settlements that, if engaged in by non-class attorneys, would be deemed shockingly unethical malpractice. See Susan P. Koniak, *Under Cloak of Settlement*, 82 VIRGINIA L. REV. 1051 (1996).

Lacking specific guidance, many courts reduce the inquiry into the adequacy of counsel's representation to a cursory, one-time initial check of counsel's experience. See, *e.g.*, *Hoban* v. *USLife Credit Life Ins. Co.*, 163 F.R.D. 509, 514 (N.D. Ill. 1995); *Mashburn* v. *National Healthcare, Inc.*, 684 F. Supp. 660, 672 (M.D. Ala. 1988). "As long as class counsel has any experience in the area of law covered by the class action * * *, he is presumed to be adequate." *Through The Looking Glass*, *supra*, at 16-17 & n. 53. A few courts have carefully examined the vigor and competence with which class counsel have pursued their cases prior to and during settlement. See, *e.g.*, *Epstein*, 126 F.3d at 1248-1255; *In re General Motors*, 55 F.3d at 801-804. But, as this case demonstrates, clear, consistent standards by which class counsel's performance will be measured are lacking.

This case thus presents an ideal opportunity to clarify the extent to which, as a matter of minimal due process, class counsel must investigate the existence and value of class members' actual claims and disclose that information to a court when presenting a settlement. Establishing suitably clear criteria for lower courts to use in evaluating "adequate" representation will deter the flagrant misuse of class actions and legitimize the finality of judgments.

C. The Pennsylvania Court's Decision That Class Counsel's Representation Was Constitutionally Adequate Was Erroneous And The Issue Is Properly Framed For Review

1. The decision of the Pennsylvania courts upholding the adequacy of representation here was wrong as a matter of due process. That class counsel in this case did not vigorously protect the interests of the class in this case is an extravagant understatement. Class counsel readily conceded that he lacked any knowledge that Prudential possessed damage claims at all, let alone claims for over $110 million. Brief of Trial Class Reps., at 1 n.1 (Superior Court). Had he engaged in the most minimal inquiry, he could not have helped but to discover them. A one-line discovery request served on defense counsel — "Identify all pending actions against your clients involving their manufacture of asbestos-containing materials, including the names and best addresses of the plaintiffs and the amounts they are claiming" — would have elicited the information handily. Indeed, defense counsel, traveling between the two adjacent litigations in Pennsylvania and New Jersey, likely had had to bite their tongues more than once to resist the urge to blurt out a disclosure.

Alternatively, a two-minute Westlaw or Lexis search would have unearthed the claims: the New Jersey action already had resulted in two published opinions. See *Prudential Ins. Co.* v. *U.S. Gypsum Co.*, 711 F. Supp. 1244 (D.N.J. 1989); *Prudential Ins. Co.* v. *U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir. 1993). Counsel also could have asked the defendants for an affidavit containing the relevant information as a prerequisite to settlement. Rather than engaging in that minimal inquiry, class counsel simply settled 36,383 claims of unknown value for $125 a piece and a comparatively lavish $3.3 million in claimed counsel fees. The conclusion that the fees were the motivating factor is inescapable.

Class counsel's willingness to blind himself to the unfairness of his treatment of absent class members was surpassed only by that of the Pennsylvania courts. While the opinions below pay lip service to the adequacy of representation, they engage in no serious assessment of that constitutional requisite.

Thus, this case provides the Court with the important opportunity to declare that due process specifically demands

competent negotiation of a settlement and that constitutional competence requires some reasonable effort to appreciate and compare the value of the rights dissolved with the value of the benefits obtained in exchange. See *Epstein*, 126 F.3d at 1251; see also FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995) (identifying factors court should take into account in evaluating settlement, including value of claims resolved). Indeed, this Court itself has warned of the dangers of a class action "bargain proffered for [a court's] approval without benefit of adversarial investigation." *Amchem*, 117 S. Ct. at 2235. Accordingly, the Court should insist that adequate representation demands such "adversarial investigation" of the claims that class counsel and defense counsel are proposing to extinguish. *Id.*

2. Prudential properly raised and preserved the issue of the constitutional inadequacy of class counsel's representation, and the appellate court erred in refusing to reach it. The appellate court's decision was predicated upon its belief that the argument had been "pursued initially in Prudential's petition for reconsideration." App. 7a-8a. That belief was demonstrably false. Prudential raised and argued the issue in *both* its initial Petition to the Court of Common Pleas *and* its Petition for Reconsideration filed with the same court; indeed, it did so to exactly the same degree, and invoking the same authorities, in both briefs. See *supra*, pp. 7, 8.[11] Prudential raised and argued the issue again in its notice of appeal and opening appellate brief. Compare *Adams* v. *Robertson*, 520 U.S. 83 (1997). Because, as a factual matter, it is indisputable that Prudential actually raised and argued its federal claim in its initial papers, there can be little debate that Prudential presented

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[11] When Prudential raised this constitutional objection in its initial petition for relief, it explained that its lack of familiarity with the history of the Pennsylvania class action proceedings precluded it from addressing the adequacy of representation in its totality, and requested an opportunity to engage in discovery and present further argument on the issue at a later time. See *supra*, pp. 7-8. The appellate court did *not* hold that Prudential's "reservation" of part of its argument in that manner constituted waiver; instead, the appellate court mistakenly asserted that Prudential had never raised the issue at all. This sole reason for declining to reach Prudential's argument was simply wrong.

it to the State courts with "'fair precision and in due time.'" *Id.* at 88 (quoting *New York* v. *Zimmerman*, 278 U.S. 63, 67 (1928)).

This Court has repeatedly held that a state court's erroneous decision to side-step a properly framed federal issue will not insulate it from this Court's review. See, *e.g.*, *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988); *Wright* v. *State of Georgia*, 373 U.S. 284, 289-290 (1963). Just last month, the Court held that when, as in this case, a state court predicates its refusal to reach an issue upon a blatant factual error, its refusal does not provide an "adequate state ground" that can bar a litigant from obtaining review by this Court. *South Central Bell Tel. Co.* v. *Alabama*, 119 S. Ct. 1180, 1185 (1999). The same analysis compels the conclusion that this Court is entitled to use this case to determine that due process requires class counsel to conduct a reasonable evaluation of the pending claims of absent class members before agreeing to settle them.

III. THE "BEST PRACTICABLE" NOTICE ENTAILS NOTICE TO THE BEST AVAILABLE ADDRESSES

Even if the representation had been adequate in this case, that would not excuse the deficiency in the notice procedure used. Due process dictates that identifiable absent class members in suits for money damages receive *both* adequate notice *and* adequate representation. See *Shutts*, 472 U.S. at 812 (identifying notice and representation as cumulative requirements); see also *Richards*, 517 U.S. at 801; *Eisen*, 417 U.S. at 176-177. See generally Patrick Woolley, *Rethinking The Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

A. The Question Of What Constitutes "Best Practicable" Notice Has Overwhelming Importance

The Pennsylvania appellate court acknowledged that the Federal Constitution requires that notice of a proposed class settlement must be the "best practicable," but ruled that this obligation is satisfied by notice to addresses *known* by the trial court and all counsel *not to be the best addresses* of absent class members. This ruling is irreconcilable with the Court's prohibition in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950), against "process which is a mere gesture"

or "a feint." Yet it is unfortunately representative of the laxity with which the lower courts often apply the constitutional mandate of "best practicable notice" articulated in that case and its progeny.

The Court has visited the issue of the constitutional adequacy of notice in a wide variety of *individual actions*. In that context, it has ruled, for example, that (1) "'reasonably diligent efforts'" must be undertaken to "ascertain" the would-be recipient's best address, *Tulsa Prof. Collection Servs., Inc.*, v. *Pope*, 485 U.S. 478, 491 (1988) (quoting *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 798 n.4 (1983)); (2) notice must be sent to the best address of which the sender has actual knowledge, *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); and (3) notice must be sent to the guardians of individuals who would be unable to appreciate its legal significance, *Covey* v. *Town of Somers*, 351 U.S. 141, 145-146 (1956).

Here again, however, the lack of precise guidance about how to translate these principles into the context of *class actions* has left the door ajar to pervasive abuse. Since *Mullane*, a decision rendered almost half a century ago, the Court has provided little instruction on how courts in representative actions should ensure that absentees receive notice. It reiterated fifteen years ago in *Shutts* that class notice must be the "best practicable, 'reasonably calculated * * * to apprise interested parties of the pendency of the action.'" 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-315). And it held in *Eisen* that Rule 23 forbids a court to "tailor" the individual notice requirements "to fit the pocketbooks of particular plaintiffs" and class counsel. 417 U.S. at 176.[12] But the Court has not yet delineated the specifics of the constitutional requirement that absent class members receive the "best practicable" notice.

Left with the responsibility of giving content to that somewhat opaque standard, the lower federal and state courts habitually emphasize the "practicability" of notice over its quality. In the unwieldy nation-wide class actions over which state and lower

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[12] The Court has recognized that the mandatory notice provision of Rule 23 was "'designed to fulfill requirements of due process.'" *Eisen*, 417 U.S. at 173-174 (quoting *Rules Advisory Comm. Notes to Fed. R. Civ. P. 23*).

federal courts are being asked to preside, efficiency and cost-savings trump the Court's directive that the court and parties exercise "due diligence" to ensure that notice to identified class members be given in a manner that is "reasonably certain" to reach them. *Mullane*, 339 U.S. at 315. By failing to adopt procedures designed to ensure accurate direction of notices, these decisions undermine the foundation on which the right to opt out is premised: the assumption that class members will actually learn that a court is adjudicating their claims. See *Shutts*, 472 U.S. at 811-812.

Judicial leniency concerning notice procedures is especially dangerous in light of the incentives both class counsel and defense counsel have to *minimize* the number of class members who actually receive notice. The more class members who receive notice, the more opt-outs; the less favorable the deal for defendant; the more likely a "blow-out" provision, like the one to which the parties agreed in this case, will be triggered; and the less likely class counsel will get their fees. Moreover, representative plaintiffs (or their counsel) are generally required to pay the costs of notice. See *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978). Not surprisingly, that reverse incentive system rarely stimulates class counsel to engage in strenuous efforts to ensure actual notice. Accordingly, proof-of-claim rates typically are appallingly low. See generally 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS App. 8-4 (3d ed. 1992) (Tables of Response Rate Levels) (documenting proof of claim rates as low as 0.28%).

The appellate court's approval of the notice procedure in this case is symptomatic of the trend. The court sustained a mass mailing to an old notice list without *any* effort (1) to use the addresses that class members who previously had opted out — and hence were most likely to opt out again, if given notice and an opportunity — had filed with the court; (2) to ensure that notice to corporate class members was directed to responsible officers or agents; or (3) to research addresses of class members whose notices were returned as undeliverable. As the decision below illustrates, clarification from the Court of the malleable "best practicable" notice standard is essential.

These issues are of immense importance, arising in virtually every class action and affecting their fundamental fairness. This case presents an excellent opportunity to remind the lower courts that, even in the class action context, "the Constitution recognizes higher values than speed and efficiency." *Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973) (internal quotation marks omitted).

B. Lower Courts Interpret "Best Practicable" Notice Inconsistently

The lower courts have demonstrated marked confusion about whether class action notice procedures must include efforts to ascertain the *best* addresses of class members, *i.e.*, those most likely to result in actual receipt. Some courts require extensive efforts to ascertain the correct addresses of identifiable class members, *e.g.*, *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098-1099 (5th Cir. 1977), and exclude class members to whom notice could not be delivered, *e.g.*, *Shutts* v. *Phillips Petroleum Co.*, 679 P.2d 1159 (Kan. 1984), *aff'd in part and rev'd in part*, 472 U.S. 797 (1985). Others hold that the direction of notices to incorrect addresses is not a procedural deficiency so unreasonable as to render the notice unconstitutional, *e.g.*, *Peters* v. *National R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992); *Gross* v. *Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345 (M.D. Fla.1995); *Trist* v. *First Federal Savings & Loan Ass'n*, 89 F.R.D. 1, 2 (E.D. Pa. 1980) (notice directed to several thousand incorrect and expired addresses, and not directed at all to 37 class members, found unproblematic). And many courts tolerate exceedingly high percentages of "undeliverables" without demanding further efforts to ensure actual notice, *e.g.*, *Burns* v. *Elrod*, 757 F.2d 151, 153 (7th Cir. 1985) (deeming "adequate" notice to addresses on a 10-year-old list, even though 500 of the 700 notices were returned as undeliverable); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) (no supplemental notice required even though notice had failed to reach one third of the class members).

Thus, as one authority on class actions has observed, there is a "conflict in the lower federal courts" regarding "the proper construction of the requirement for 'the best notice practicable under the circumstances.'" 2 NEWBERG ON CLASS ACTIONS, *supra*, § 8.02, at 8-5. See also George Rutherglen, *Better Late Than*

Never: Notice & Opt Out at the Settlement Stage of Class Actions, 71 N.Y.U. L. REV. 258, 264 (1996) ("It remains uncertain * * * exactly what kind of notice the Due Process Clause requires."); *id.* at 266 (same). This case offers the Court an opportunity to confirm that, even in the class action context, (1) the "best practicable notice" *always* entails use of the *best addresses* in the court's and class counsel's possession; (2) notice to a company or corporation generally must be directed to its headquarters or an agent likely to comprehend its significance; and (3) due process demands reasonable efforts to use accurate addresses when the stakes are high.

C. The Notice Procedures Adopted By The Court In This Case Were Not The "Best Practicable" Because They Were Not Designed To Achieve Actual Notice

While the standards for "best practicable" notice require clarification, under any standard it is plain that the notice provided to Prudential violated elementary notions of fairness. Notice in representative actions is the "best practicable" only if "[t]he means employed [are] such as one desirous of *actually informing* the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315 (emphasis added). The chosen method must either be "*reasonably certain* to inform those affected" or, "where conditions do not reasonably permit such notice, * * * the form chosen [must not be] substantially less likely to bring home notice than other of the feasible and customary substitutes." *Ibid.* (emphasis added). The method chosen in this case was neither.

Notice calculated actually to *inform* class members who had opted out of the first settlement class of the new settlement would have been sent to the addresses they had provided in their first opt-out forms (unless they had since filed a more recent address with the court). In Prudential's case, the address its counsel had provided in its prior opt-out form was also, not coincidentally, the location of its headquarters.[13] These were the addresses actually

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[13] The 1995 opt-out form included a space specifically requesting that opt-outs provide their addresses. See App. 60a. Prudential's representative, Steve Lauer, did exactly that. See *id.* The obvious effect of the court's request for an address was to lead class members to believe that, if they provided an address, the court would use it.

"at hand" (*Mullane*, 339 U.S. at 318), contained in the court's and counsel's own files. The trial court's failure to direct notice to the addresses provided in earlier opt-out responses was especially egregious because those class members who already had chosen once to exclude themselves from the proceedings were among the most likely to opt out again, if given a real chance to do so.

To excuse what was done here, the Pennsylvania appellate court simply incanted a familiar refrain: the failure of either class counsel or the trial court to check the addresses provided by the 356 class members who previously had filed opt-out responses was "eminently practical." App. 17a. But when class members' best addresses are at hand, "practicability" simply is not a relevant constraint. *Mullane*, 339 U.S. at 318 (where "the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely * * * to apprise them" that their rights are about to be finally adjudicated). A secretary or paralegal could have substituted the few hundred opt-out "best addresses" contained in the court's own records in a few hours. In any event, the "practicability" standard is not a license to use whatever notice method demands the *least* effort. Rather, it demands "*due diligence*" to ascertain the addresses most likely to result in actual notice. *Mullane*, 339 U.S. at 317 (emphasis added). See also *Mennonite*, 462 U.S. at 798 n.4. Reference to the court's own records to ascertain the best addresses of likely opt-outs required little diligence — it simply demanded common sense and elementary fairness.[14]

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[14] The appellate court also reasoned that updating the addresses of the class members who had opted out was unnecessary because they had all somehow received notice of the earlier settlement class. But, like Prudential, they may have learned of the class action only through serendipity, rather than through accurate individual notice. The court and class counsel had a duty to ensure that these class members who had earlier opted out — and who provided specific "best addresses" for further proceedings — would receive the "best notice practicable" of any further development affecting their rights. Cf. 2 NEWBERG ON CLASS ACTIONS, *supra*, § 8.18, at 8-64 ("[i]f the parties or the court have become aware of the names or addresses of absent class members who have not previously been sent individual notice, due process may mandate that these class members also receive individual notice of settlement").

Even apart from its failure to require class counsel to avail himself of the information in the court's records, the trial court's notice method was deficient. Due Process demands that the notice method be tailored to the nature of the class and the needs of the intended recipients, in a manner that will best ensure, to the extent practicable, *actual* receipt and comprehension. See *id.*; *Amchem*, 117 S. Ct. at 2252 (expressing doubt that class action notice whose significance cannot be appreciated is constitutionally adequate); *Robinson*, 409 U.S. at 39-40 (notice sent to legal, correct address is constitutionally inadequate, when State knew that individual would not receive it there); *Covey*, 351 U.S. at 145-147 (notice sent to legal address of a person known to be unable to comprehend its significance is constitutionally inadequate).

In this case, all parties were aware that many class members were corporate or commercial entities. It is well-established that "reasonable notice" to a corporation is notice directed "to an officer or an agent whose position in the organization indicates that there is a high probability that the papers will reach those persons in the organization responsible for protecting the firm's interests in the litigation." 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1074, at 460 (2d ed. 1987). See also *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928). Here, notice to persons "responsible for protecting the firm's interests in the litigation" (*id.*) could readily have been accomplished by directing notice to the company's headquarters. It is self-evident that the court's notice, directed instead to outlying addresses of the multi-national company, which had no nexus at all to the subject of the notice, was not calculated to apprise it of the subject of the action.[15]

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[15] The misdirection of the notice to corporate outposts was especially egregious in light of the fact that the notice failed to identify with specificity the buildings to which it purportedly pertained. As defendants themselves had explained regarding the similar prior notice, "the Notice fails adequately to inform recipients of whether they are actually in the class, and if so, what buildings or parts of buildings are at issue." Certain Defs. Mem. in Opp. to Pltfs. Motion for an Order Approving Class Notice, at 6 (June 18, 1993). As a result, the recipient of the notice might not have intuited that the notice pertained *neither* to the building to which it was actually directed *nor* to the buildings managed by the office at that location, *but instead* to entirely different buildings.

Such generalized notices are not reasonably calculated to provide a large corporation with practical, actual notice in time to allow responsible managers and counsel to take effective action to protect the corporation's interests. See *Greene* v. *Lindsey*, 456 U.S. 444, 452 (1982) ("In determining the constitutionality of a [notice] procedure, * * * 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.'") (quoting *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283 (1925)). With "due diligence" and little expenditure of effort, class counsel could readily have acquired the addresses of the corporate headquarters or agents of class members by consulting a corporate directory, available in any library, or by performing a search in the on-line databases of secretaries of state. Compare *Eisen*, 417 U.S. at 175 ("reasonable effort" must be expended to identify names and addresses of class members).

Misreading this Court's decision in *Shutts*, the appellate court opined that no such minimal effort was necessary, reasoning that absent plaintiff class members are not entitled to the same accuracy of notice as are non-resident defendants. App. 16a. But the Court's observation in *Shutts* that "the Due Process Clause * * * does not afford [absent plaintiffs] as much protection from state-court jurisdiction as [such defendants]" concerned *jurisdiction*, not notice. 472 U.S. at 811. That comment does not buttress the appellate court's conclusion that class members are entitled only to cavalier notice. To the contrary, in *Shutts* the Court suggested that the standard for gauging the constitutional adequacy *of notice* in class actions, where an absent class member may be divested of his claim, is *identical* to the standard in forfeiture actions and similar proceedings against defendants. *Compare Shutts*, 472 U.S. at 812 (invoking *Mullane* standard as governing notice in class actions) *with Robinson*, 409 U.S. at 39-41 (invoking the same *Mullane* standard in forfeiture case); *Schroeder* v. *City of New York*, 371 U.S. 208, 213 (1962) (same in condemnation proceeding); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956) (same). The conclusion is inescapable: in *all* cases in which an individual's "constitutionally recognized property interest" is at stake — here, a class member's "chose in action" for civil damages — the Constitution demands a notice procedure reasonably calculated actually to apprise the individual of the threat that its interest will be "forever" "extinguish[ed]." *Shutts*, 472 U.S. at 807.

The appellate court's holding (App. 17a) that it would be excessively burdensome to require class counsel "to identify the actual location" of the clients whom he was purporting to represent is especially untenable in light of the magnitude of the stakes in this case. Notice is a functional concept. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 15 n. 15 (1978) ("[d]ue process is flexible and calls for such procedural protections as the particular situation demands") (internal quotation marks omitted). When the threatened deprivation is great, the process to which an individual is entitled is more substantial. See, *e.g.*, *Matthews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (a determination of the process due demands consideration of the "interests that are affected"); see also *Greene*, 456 U.S. at 451 (in light of the "significant interest" at stake, better notice was due). Even if a search for the proper addresses of corporations might not be warranted in a case in which minute sums are at stake -- itself a dubious proposition, *see Eisen*, 417 U.S. at 176 — it certainly was in this case, where the claims were for the recovery of remediation costs that could (and in Prudential's case do) reach hundreds of millions of dollars.[16]

The appellate court's suggestion that the destruction of Prudential's multi-million dollar claim was its own fault, because it had "fail[ed] to monitor this litigation" is spurious. App. 11a. This Court's views on this thesis could not be clearer: *absent class members have no duty to monitor*. "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Shutts*, 472 U.S. at 810; see also *Matsushita*, 126 F.3d at 1242-1244; *Gonzales* v. *Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973). Two of those safeguards, of course, are reasonable

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[16] The essential unfairness of the notice procedure used in this case was compounded by defendants' decision not to alert the court and class counsel that the notice would likely be inadequate to alert Prudential to the impending danger to the claims it was actively litigating against defendants in federal court. Meantime, defendants continued to litigate Prudential's New Jersey case vigorously, "implying by their silence that the * * * action[was] unaffected by the class adjudication," and lulling Prudential into complacency. *McCubbrey* v. *Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 68 (N.D. Cal. 1976).

notice and an opportunity to opt out. *Shutts*, 472 U.S. at 811-812. Thus, Prudential's knowledge that a proceeding "was taking place in the court" did not impose upon it any "duty * * * to inquire * * * about possible court orders" restricting its rights. *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953). Instead, Prudential had "a right to assume that * * * 'reasonable notice' [would] be given" to it "before [its] claims are forever barred." *Ibid.*; see also *Mennonite*, 462 U.S. at 800. That right was not altered by Prudential's status as a commercial entity: "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Id.* at 799. In sum, the Pennsylvania appellate court's decision warrants immediate correction.

CONCLUSION

The Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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APRIL 1999

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION on behalf of themselves and all others similarly situated	:	No. 637 Eastern District Allocatur Docket 1997
	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
UNITED STATES GYPSUM COMPANY, ET AL.,	:	
Respondent	:	
Petition of: PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA	:	

ORDER

PER CURIAM:

AND NOW, this 8th day of December, 1998, the Petition for Allowance of Appeal is hereby **DENIED.**

TRUE COPY FROM RECORD

Attest: DEC 8, 1998

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION, On Behalf of Themselves and All Others Similarly Situated	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, W.R. GRACE & CO.-CONN., U.S. MINERAL PRODUCTS CO. and ASBESTOSPRAY CORPORATION	:	No. 0531 Philadelphia, 1997
APPEAL OF: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PIC REALTY CORPORATION and 745 PROPERTY INVESTMENTS (Collectively "PRUDENTIAL")	:	

Appeal from the Order dated November 27, 1996, docketed December 2, 1996, Court of Common Pleas, Philadelphia County, Civil Division, at No. May Term, 1986 No. 5388.

BEFORE: BECK, JOHNSON and MONTEMURO, JJ.:

OPINION BY JOHNSON, J.:

FILED NOV 21, 1997

In this appeal we consider whether the notice procedure employed, in a class action conducted in accordance with the Pennsylvania Rules of Civil Procedure was constitutionally sufficient to bind an absent plaintiff class member. We also consider whether the vigorous litigation between an absent plaintiff and the same defendants in a parallel out-of-state action requires the absent plaintiffs' exclusion from the class of settling plaintiffs after entry of final judgment. We conclude that the notice afforded the Prudential Insurance Company of America (Prudential) satisfied the requirements of due process. We also conclude that the distinguished trial judge acted entirely within his discretion in denying Prudential's petition for exclusion from the plaintiff class or, in the alternative, a determination that its opt-out notice was timely. Accordingly, we affirm the order denying Prudential's petition and supplement thereto.

This class action was instituted May 30, 1986, by Peter Kalkus, an owner of Virginia office buildings, on behalf of owners of office buildings having United States Government tenants, against an array of asbestos manufacturers. On April 18, 1990, Prince George Center, Inc. intervened as class representative after Kalkus's claim was ruled barred by a Virginia statute of repose. On April 16, 1992, the Philadelphia Court of Common Pleas certified the class as follows:

> . . . private owners of buildings (within the District of Columbia and the fifty United States) that were leased or subleased in whole or in part to the Federal Government or any agency, department or unit thereof, on or after May 30, 1986, in which buildings, asbestos containing material was or is present.

Memorandum and Order, Kremer, J., dated April 16, 1992; R.R., Vol. I, at 268a. Notice of this order was never required. On May 7, 1993, the court ordered this action to proceed on an opt-out basis, as provided in Pa.R.Civ.P. 1711(a).

By early 1995, twenty-four of the twenty-eight non-bankrupt defendants in this action had executed settlement agreements with plaintiffs' counsel, contingent upon court approval. Settlement funds totaling $3,782,400 and a cash rebate program had been advanced. To facilitate court approval of these settlements, the court decertified the plaintiff class in February 1995, and certified a settlement class. The court conditionally certified a separate trial class, pursuant to Pa.R.Civ.P. 1710(d), to continue the litigation against the four non-settling defendants. The new classes were defined as:

> . . . a Settlement Class consisting of all private owners of any building or buildings in the United States that were leased or subleased in whole or in part to the federal government or any agency, department or unit thereof at any time between May 30, 1984 and December 22, 1994, inclusive, in which building(s) asbestos or asbestos-containing materials were present.

And:

> . . . a Plaintiff Class for purposes of trial consisting of all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994, inclusive, (1) leased or subleased their building(s) in whole or in part to the United States or any agency thereof; and, (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by U.S. Gypsum and/or U.S. Mineral Products Company and/or W.R. Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy with him/her or it to misrepresent

or withhold from the public, knowledge of the hazards of asbestos.

Amended Order, Bonavitacola, J., dated February 17, 1995, at ¶¶ 2, 4, attached as Exhibit G to Affidavit of Prudential's Counsel in Support of Petition for Declaratory Relief.

In October 1987, Prudential, as an owner of commercial buildings, sued the trial class defendants in the United States District Court for the District of New Jersey. Prudential's claim was for damages incurred and to be incurred as a result of asbestos in its buildings. By stipulation of the parties, on March 26, 1995, this suit was limited to eighteen Prudential buildings.

In February 1995, the Pennsylvania trial court ordered that notice of the settlements and their terms be sent to the settlement class and scheduled a hearing for objections and approval of the settlements for May 19, 1995. Class members could opt out of the settlement class by filing a written election with the court by April 18, 1995. A summary notice of the settlement was published twice in the Wall Street Journal and eight major metropolitan newspapers. A more detailed notice was sent by first class mail to 36,383 potential class members appearing on a list compiled by the General Services Administration and the United States Postal Service which contained the names and addresses of federal agency landlords. Prudential was identified as the owner of seven properties on this list and notices were mailed to each. None of these properties were involved in Prudential's New Jersey litigation.

On April 28, 1995, Steven A. Lauer, a member of Prudential's house counsel staff, executed the form to opt out of the settlement class on behalf of Prudential. On May 10, 1995, Robert Gilson, counsel to Prudential, drafted a letter to the Philadelphia Prothonotary for Lauer's signature indicating that Prudential did not want to be a member of any future class in the Prince George Center, Inc. action unless

Lauer received notice and filed an affirmative election to participate. This letter was never sent.

By April 1996, the four remaining defendants in this action had executed settlement agreements. The trial court ordered that notice be given and that an approval hearing be held July 24, 1996. Exclusion requests were to be filed by July 9, 1996. Notice was disseminated in May 1996 to the same addresses as the earlier settlement notices, advertised in the same newspapers as the earlier notice, posted on the internet, and announced in five trade publications. The notice of settlements with the trial defendants stated:

> If you are already a party to another lawsuit against Grace, U.S. Gypsum, U.S. Mineral and/or Asbestospray not involving personal injury, you must nonetheless file an Exclusion Request; otherwise, you will be bound by the Settlement Agreement and the Final Judgment Order, and your lawsuit will be enjoined.

Notice of Proposed Settlements, Bonavitacola, J., dated April 24, 1996, at ¶ 24, attached as Exhibit L to Affidavit of Prudential's Counsel in Support of Petition for Declaratory Relief. Seven notices were sent to the same Prudential buildings as the earlier notice, and the Post Office returned two of these as undeliverable.

Prudential did not return an exclusion request, nor did it appear at the July 24 hearing. 289 members of the trial class opted out of the settlement, an important number since Grace and Gypsum had reserved the right to rescind the agreement if 500 exclusion requests were received. The court approved the settlements at the hearing and judgment was entered in favor of the four defendants on August 13, 1996. The settlement required $7,740,000 to be paid into the fund established by the twenty-four defendants who had settled previously. The judgment served as a release of the four defendants from any claims that were or could be asserted by the remaining class members and limited those plaintiffs' recoveries to the settlement fund.

Immediately after the appeal period for this judgment expired, the four trial class defendants informed Prudential's New Jersey counsel of the August 13 judgment, claiming that it applied to eight of the buildings involved in the New Jersey litigation. On September 30, 1996, Prudential petitioned the trial court for a declaration that it was not a class member. This petition was denied on November 27, 1996. Prudential petitioned for reconsideration on December 10, 1996. The trial court declined to reconsider this order on December 17, 1996, and this appeal followed.

Prudential raises multiple issues in this appeal. Initially, it argues that the trial court erred in including Prudential as a class member without affording it notice consistent with due process. Prudential also argues that the trial court erred in determining that it was a member of the trial class because it had provided timely and effective notice to the defendants of its intent to opt out of the trial class. Prudential further argues that the trial court abused its discretion in denying equitable relief from the judgment on the facts presented.

Prudential also makes broad attacks on the certification of the trial class and the approval of the settlements reached between the class representative and the trial class defendants. Prudential challenges the adequacy of the settlements and class counsel's representation of its interests. It also claims the certification of the trial class was improper under the Pennsylvania Rules of Civil Procedure. Finally, Prudential argues that the conduct of the trial class defendants in obtaining the settlements was fraudulent, and that they have taken positions in related litigation which estopped them from opposing Prudential's petition.

The trial class defendants responded with a motion to quash this appeal except the single issue challenging the trial court's discretion in refusing to allow Prudential to belatedly exclude itself from the trial class. This Court will only consider those issues properly raised in Prudential's petition filed September 30, 1996, and disposed of by the trial court's

order of November 27, 1996, to wit: whether the notice afforded Prudential was constitutionally adequate; whether pending litigation altered Prudential's status as a class member; and whether the trial court abused its discretion in refusing to grant Prudential relief from this judgment. The remaining arguments were pursued initially in Prudential's petition for reconsideration. This Court has no jurisdiction over a trial court's denial of a petition for reconsideration. *Estate of Merrick*, 432 Pa. 450, 454, 247 A.2d 786, 787-88 (1968); *Seibel v. Allstate Insurance Co.*, 346 Pa.Super. 384, 392, 499 A.2d 666, 670 (1985); *Provident Nat'l Bank v. Rooklin*, 250 Pa.Super. 194, 378 A.2d 893 (1977). We hold that the issues raised initially in Prudential's petition for reconsideration are similarly beyond the scope of our jurisdiction and we decline to consider them in this appeal. *See* Pa.R.A.P. 302(a).

Prudential argues that its vigorous devotion of time and resources to the prosecution of the New Jersey litigation during and beyond the time in which it was required to affirmatively seek exclusion from the trial class constituted a de facto withdrawal from that class. Prudential further argues that because counsel for the trial class defendants was the same in both the Pennsylvania and New Jersey actions, the defendants were estopped from asserting that Prudential did not withdraw from the class.

Essentially, Prudential petitioned the trial court to declare that its continued litigation in New Jersey was effective to exclude it from the settlements. Prudential styles this issue one of first impression in Pennsylvania. The nature of the procedure utilized by the trial court for determining class membership undermines this view of the facts.

In Pennsylvania all class members are plaintiffs in the action upon the filing of the complaint. *Allessandro v. State Farm Mut. Auto. Ins. Co.*, 487 Pa. 274, 279 n.9, 409 A.2d 347, 350 n.9 (1979). A trial court is empowered to require

parties wishing to be excluded from a particular class to file of record, by a specific date, "a written election to be excluded from the class." Pa.R.Civ.P. 1711(a). The United States Supreme Court has sanctioned the use of this "opt-out" procedure for all types of class action plaintiffs, explaining "If . . . the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or thought about filing suit, and should be fully capable of exercising his right to 'opt out.'" *Phillips Petroleum Co. v. Shutts*, 272 U.S. 797, 813 (1985).

Prudential was aware of the existence of this action and the proper method for extricating itself from it. Indeed, it utilized the form provided with the notice of the first proposed settlement to decline participation in that settlement. Prudential admits that it received professional advice on this aspect of the litigation and had a letter drafted which would have avoided the possibility of it unwittingly being bound to any future judgment in this case. Prudential cannot now claim that its continued litigation of another decade-old suit against the same defendants, not limited to the claims subject to this action, was intended as a sufficient notification of its desire to exclude itself.

The prevailing federal view is that pending litigation is no substitute for compliance with judicially ordered exclusion procedures. *See In re Prudential Securities Litigation*, 164 F.R.D. 362, 370 (S.D.N.Y. 1996), *aff'd* 107 F.3d 4 (2d Cir. 1996); *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 513, *aff'd per curiam*, 490 F.2d 1183, 1186 (2d. Cir. 1974). *See also In re National Student Marketing Litigation*, 530 F.2d 1012, 1015 (D.C. Cir. 1976) (fact of pending litigation by particular plaintiffs raised no requirement of specific, additional notice relating to opt-out procedures). *But see McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 68-69 (N.D. Cal. 1976) (because notice was not specific as to effect of settlement on pending litigation nor explicitly mandated exclusive opt-out

procedure, failure to affirmatively opt-out was no bar to continued litigation in separate forum). A contrary Pennsylvania rule is not desirable. When numerous similar claims exist, parallel litigation will likely be the rule, not the exception. A prime purpose of the class action is to promote judicial economy by reducing the amount of duplicative litigation in our courts. Further, defendants are often willing to settle with a class representative for the very reason that they hope to gain relief from otherwise endless litigation instituted by similarly situated plaintiffs. The trial class defendants manifested that desire, in this case, by explicitly bargaining for a 'blow-out' provision, which would have enabled them to avoid the settlement if five hundred potential individual claimants filed exclusion requests. We hold that a pending lawsuit is not effective to exclude a party from a class action conducted under Pa.R.Civ.P. 1711(a).

Accordingly, this Court must merely decide whether the trial court acted within the limits of its discretion when it declined Prudential's petition in equity to afford it relief from its own failure to avoid a judgment entered against it.

Generally, petitions for relief from judgments are addressed to the sound discretion of the trial court. *See, e.g., Sklar v. Harleysville Ins. Co.*, 526 Pa. 617, 619, 587 A.2d 1386, 1387 (1991); *Castings Condominium Ass'n v. Klein*, 444 Pa.Super. 68, 72, 663 A.2d 220, 223 (1995). A trial court abuses its discretion when it misapplies the law, or when its decision is "manifestly unreasonable" and not a mere error in judgment. *Castings Condominium, supra.*

The standards guiding a trial court's discretion in opening default judgments provide a useful yardstick for assessing the trial court's order. This Court has emphasized that a balancing of the prejudice to the respective parties is the essence of such an equitable decision. *See Provident Credit Corp. v. Young*, 300 Pa.Super. 117, 129-31, 446 A.2d 257, 263-64 (1982) (en banc). We have clarified, however, that a court will not weigh competing claims of

prejudice unless the party seeking such equitable relief first establishes that he or she moved promptly to cure their default and that a reasonable excuse for the default existed. *Castings Condominium*, *supra*, at 77, 663 A.2d at 225. This standard applies when a defendant seeks relief from a monetary judgment entered without benefit of adversary proceedings. Certainly no lesser standard should apply in a case such as this, where the defendant obtains the judgment under attack in exchange for a substantial settlement payment.

We decline to take issue with the trial court's determination that Prudential offered no reasonable excuse for its failure to timely act. Prudential had notice of the substance of this action in April 1995. It obtained the advice of counsel and was presumably aware of the ramifications of a failure to opt out of the action. It is undisputed that further notice, specifically concerning the instant settlement, was delivered to five separate Prudential properties in May 1995. Prudential has offered no explanation as to how these notices failed to reach any responsible person in its organization as the first notice apparently did, nor does Prudential adequately explain its failure to monitor this litigation after filing its exclusion request relating to the first settlement. Instead, Prudential relies on the failure of its opponents to affirmatively advise it that the clock was running. This Court has refused to recognize a litigant's obligation to cure an opponent's unilateral mistake. *See id.* at 75-76, 663 A.2d at 224 (party seeking relief from default judgment cannot rely on opponent's silence as a reasonable excuse for its own mistake regarding necessity of action). *Accord*, *Supermarkets General Corp*, *supra*, at 514 (the district court rejected a heightened notice requirement in cases of pending litigation, explaining that "[t]he failure of the internal procedures of the plaintiff to see that the notice reached the proper person is no excuse"). The author of a leading treatise on class actions offers this advice:

> Plaintiffs who have previously instituted an independent action are not automatically excluded as potential members of a subsequently filed class action that is upheld by the court, so counsel who file individual actions should consider entering an appearance in the class action in order to secure essential court papers, particularly the Rule 23(c)(2) notice, which contains the option for exclusion.

HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS, § 16.13, at 16-73 (3d ed. 1992). The trial court's conclusion that, "[t]o the extent [Prudential] operated in the dark, it pulled the curtain down on itself", was not an abuse of discretion. Opinion, Bonavitacola, J., dated March 26, 1997, at 26.

The federal courts have been confronted with similar belated requests for exclusion from class action settlements. The prevailing analysis in the federal realm is one of "excusable neglect," the determination of which rests within the discretion of the trial court. *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) (per curiam); *In re Prudential Securities Litigation*, *supra*, at 369; *In re Del-Val Financial Corp. Securities Litigation*, 154 F.R.D. 95, 96 (S.D.N.Y. 1994); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust*, 120 F.R.D. 51, 52 (N.D. Ill. 1988). As one court explained, under the Federal Rules of Civil Procedure, "[a]dequacy of notice to the class as a whole determines the binding effect of a class settlement on an individual member, [but] a Court retains the power to allow claimants to file late opt-out requests. . . ." *In re Prudential Securities Litigation*, *supra*, at 368 (citations and quotation marks omitted). To establish excusable neglect, a moving party must show both good faith and a reasonable basis for not acting within the time provided for exclusion from the class. *Id.* at 369.

> Even upon a finding of excusable neglect, it remains within the district court's sole discretion whether or not

> to grant the extension. Factors to be considered in making this decision include: the interests of the movants, the interest of the defendants, and the impact of granting the requested extensions on the Settlement itself.

Id. (citation omitted).

The United States Court for the Southern District of New York has considered two substantially similar cases under the excusable neglect standard. In *In re Prudential Securities, Inc.*, *supra*, a party seeking a late exclusion argued that Prudential's failure to inform them of the *existence* of a class action during the course of parallel litigation estopped Prudential from seeking a termination of the individual suit upon settlement of the class action. *Id.* at 369. They further argued that Prudential would not be prejudiced by their late exclusion because Prudential was aware of their intention to continue their individual actions. *Id.* The court found these arguments to be meritless, observing that pending litigation uniformly does not excuse a class member from filing an exclusion request. *Id.* at 370. The court then explained the meaning of prejudice in this context, noting that Prudential "bargained for the precise finality that these movants now seek to undermine." *Id.*

Similarly, in *Langford v. Devitt*, 127 F.R.D. 41 (S.D.N.Y. 1989), an attorney argued that, though he had notice of a federal class action and made every effort to monitor it in light of his own litigation in an Ohio state court, he should be allowed to opt out late because he had no actual notice of the deadline for exclusion. He urged the court to grant his request because "the defendants participated in both the New York and Ohio litigation knowing that [he] had been deemed a class member in the New York litigation, knowing that there was a risk that the New York litigation might be used to preclude [his] litigation in Ohio and, most egregious of all, knowing [he] was unaware of this status." *Id.* at 43. The court found this argument

"disingenuous," reasoning that his experience as an attorney and his actual awareness of the class action made him able "to understand the significance and potential effects of the class action, the means available to review the details of the class action, and the legal options regarding participation. . . ." *Id.* at 45. The court refused to permit him to rely on his own inaction to justify a late exclusion from the class. Here, Prudential has failed to convince us that the trial court was barred from reaching a similar conclusion on the indistinguishable facts of this case. *See generally Janicik v. Prudential Ins. Co.*, 305 Pa.Super. 120, 127 n.3, 451 A.2d 451, 454 n.3 (1982) (explaining that federal precedent is "instructive in construing Pennsylvania's class action rules" due to the heavy consideration of the Federal Rules and federal precedent in their drafting). The trial court's refusal of equitable relief was not an abuse of discretion.

Prudential argues that the trial court violated its due process rights by attempting to bind Prudential to the court's judgment without providing adequate notice to enable it to exclude itself from the settlement. The United States Supreme Court has explained the process due to those in Prudential's position:

> [T]o bind an absent plaintiff concerning a claim for money damages or similar relief at law, [a forum state] must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and

returning an "opt out" or "request for exclusion" form to the court.

Phillips Petroleum Co. v. Shutts, *supra*, at 811-12.

Prudential contends the notice it received was not the best that could have been accomplished. It identifies three places where notice could have been sent which were better suited to insuring that persons responsible for making decisions concerning Prudential's numerous properties were actually apprised of the need for action. First, Prudential argues that class counsel should have referred to the exclusion notices received in response to the first round of settlements when compiling the second mailing list, whereby notice would have been sent to Stephen Lauer, Prudential's in-house counsel at its Newark headquarters. Second, Prudential argues that notice to any particular property of Prudential, which owns real estate throughout the nation, is inadequate. It maintains that significant decisions respecting property should reasonably be expected to be made at corporate headquarters, the address of which is readily obtainable, and that one intending to provide the best notice would certainly have mailed it there. Third, Prudential claims that counsel for the trial class defendants also represented these parties in the New Jersey litigation, and that they assumed a contractual duty, pursuant to the settlement agreements, to ensure that notice for Prudential was sent to its counsel in the New Jersey action.

We first observe that Prudential received actual notice of this class action. Further, under Pennsylvania law, Prudential's assertion that it has no record of receiving the five settlement notices at separate locations is insufficient to overcome the presumption that these notices were, in fact, delivered. *See Kulick v. Com., Dept. of Transportation*, 666 A.2d 1148 (Pa.Cmwlth.1995), *appeal denied*, 674 A.2d 1077 (1996). While the adoption of the best practicable means of accomplishing actual notice is the responsibility of the nominal plaintiff in a class action, actual receipt of notice is

not the measure of the constitutionality of the notice method employed. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Moreover, "actual receipt of class notice is not necessary in order to bind an absent class member to a final judgment." *In re Prudential Securities, Inc.*, *supra*, at 369. While we believe Prudential's actual notice is sufficient to dispose of this claim, we will address the notice procedures employed in light of Prudential's challenges.

Initially, we note that Prudential completely misstates the burdens imposed on class counsel and the trial court in effecting notice of a class action settlement. Prudential's cites to *Geier v. Tax Claim Bureau of Schuylkill County*, 527 Pa. 41, 588 A.2d 480 (1991), and *Tracy v. Chester County Tax Claim Bureau*, 507 Pa. 288, 489 A.2d 1334 (1985) for the proposition that a reasonable effort must be made to ascertain the actual whereabouts of a property owner, including searching government records. These cases involved government foreclosure actions against property owners. The United States Supreme Court has stated that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants . . ., the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as the latter." *Phillips Petroleum, supra*, at 811. Accordingly, *Geier* and *Tracy* are inapposite to our determination in this case. Prudential essentially insists upon receiving the best notice that could be afforded based on its unique circumstances. The true measure of the constitutionality of class member notice under *Phillips Petroleum* must necessarily focus on what is "practicable" in the circumstances where equally effective notice must be sent to over 36,000 potential class members.

Prudential argues that notice should have been sent to the addresses listed on the few hundred exclusion forms received by the court in the first round of settlements. These exclusion notices were received in response to the notice sent

to everyone the federal government identified as a landlord of a federal agency in the years in question, presumably the best way of identifying this class. We think it eminently practical for the court and class counsel to have assumed that the previous notice was effective to reach at least those parties that had actually responded. If any person or entity requesting exclusion disagreed, they properly could be expected to enter an appearance or otherwise alert the court as to their preferred address. In giving notice of the second settlement, the court and class counsel justifiably focused their efforts on reaching those persons and entities whose addresses were not included in the first round. To this end, publication notice was expanded to include five trade publications and an internet site. We find that the widespread publication of notice utilized by class counsel was a constitutionally sufficient means of reaching parties who were not adequately identified through the government's list. *Mullane*, *supra*.

Prudential's contention that notice should have been mailed to its Newark headquarters because it was easily identifiable warrants little discussion. It is the antithesis of practicability to require that class counsel attempt to identify the actual location of the 36,000 individual and corporate lessors identified from the properties on the federal government list.

Prudential's third contention, that counsel for the trial class defendants deprived it of due process by failing to satisfy an alleged contractual duty to alert class counsel to the identity of Prudential's New Jersey counsel, is meritless. The *"plaintiff*, not defendant, in a plaintiff-class action is responsible for providing notice to the members of the defined class." *Langford v. Devitt*, *supra*, at 45 n.1, citing J. Moore & J. Kennedy, 3B Moore's Federal Practice ¶ 23.55, at 23-423 to 23-424 (2d ed. 1987). Pa.R.Civ.P. 1712(c) explicitly charges the plaintiff with the sole obligation of preparing class notice unless otherwise directed by the court. Defendants' alleged contractual duty does not alter

the minimal notice requirements under the Due Process Clause. Therefore, we conclude that Prudential received constitutionally adequate notice in this case.

Order **AFFIRMED.**

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION, On Behalf of Themselves and All Others Similarly Situated	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, W.R. GRACE & CO.-CONN., U.S. MINERAL PRODUCTS CO. and ASBESTOSPRAY CORPORATION	:	No. 0531 Philadelphia, 1997
APPEAL OF: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PIC REALTY CORPORATION and 745 PROPERTY INVESTMENTS (Collectively "PRUDENTIAL")	:	

Appeal from the Order dated November 27, 1996, docketed December 2, 1996, Court of Common Pleas, Philadelphia County, Civil Division, at No. May Term, 1986 No. 5388.

BEFORE: BECK, JOHNSON and MONTEMURO, JJ.:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

/s/ [Name]_____

PROTHONOTARY

Dated NOVEMBER 21, 1997

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
v.	:	
U.S. Gypsum Co., et al.	:	No. 5388

OPINION

BONAVITACOLA, P.J.

The fundamental question raised in this asbestos class action by the appeal of Petitioner, The Prudential Insurance Company of America and two of its subsidiaries ("Pru"), is:

Under what circumstances, if any, may an absent plaintiff class member opt out of the plaintiff class after entry of a judgment against him, her or it ("it") entered pursuant to Court approval of a class action settlement which, *inter alia,* limits (with one exception not here relevant) its remedies under assertable causes of action to participation in the settlement fund?

This appears to be an issue of first impression in which a Pennsylvania state court was required to deal with this issue. Consequently, it is helpful to turn to federal case law for guidance.

To understand the context in which this question arises a chronology is helpful.

BACKGROUND

On May 30, 1986, Peter Kalkus, owner of Virginia office buildings containing asbestos and having United States Government tenants, instituted this action against an array of asbestos manufacturers (only 28 of whom are not now

bankrupt) on behalf of himself and all United States building owners similarly situated.

Extensive discovery ensued. On or about August 23, 1989, a former judge of this Court determined Virginia's statute of repose barred Kalkus' claim. Nevertheless, to preserve this action, he allowed Plaintiff's counsel to find a substitute representative plaintiff. On October 18, 1989, Plaintiff counsel asked that Prince George Center, Inc. be allowed to intervene as class representative. On April 18, 1990, the Court allowed Prince George Center, Inc. to intervene as such.

Starting in 1988, various defendants entered into settlement agreements with plaintiff's counsel contingent upon Court approval, so that by about February 17, 1995, 24 of the 28 non-bankrupt defendants had executed settlement agreements and advanced settlement funds totaling $3,782,400 cash, plus a cash rebate program of GAF Corp. capped at $750,000 rebateable over seven years.

On April 16, 1992, the Court had certified the plaintiff class as follows:

> "All private owners of buildings within the fifty states of the United States of America and the District of Columbia which were leased or subleased in whole or in part to the Federal Government or any agency, department of unit thereof on or after May 30, 1986, in which buildings asbestos-containing material is or was present."

Also on April 16, 1992, the Court had given preliminary approval to the settlement agreements which had been entered into by that time.

Adopting the United States Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L.Ed.2d 628, 105 S.Ct. 2965 (1985) *("Shutts")* that a state court could entertain a nationwide class action on an opt-out basis,

the Court on May 7, 1993 ordered that this action so proceed.

After reassignment of this case, on August 31, 1994, we appointed Daniel I. Murphy, Esquire as Special Master to "case manage" this matter. The terms of his appointment and whether he failed to follow them is an issue being raised on appeal.

To facilitate court approval of the 24 settlement agreements which Plaintiffs' counsel had executed and not await resolution of the suit against the four remaining non-bankrupt defendants, this Court by order dated February 10, 1995 as amended February 17, 1995, decertified the class previously certified on April 16, 1992, and certified a "settlement class" to proceed with the settlement agreements and a conditionally certified "trial class" as permitted under Pa.R.Civ.P. 1710(d) to continue the litigation against the four non-settling defendants ("trial class defendants").

The Court defined these two classes as follows:

> ". . . a Settlement Class consisting of all private owners of any building or buildings in the United States that were leased or sub-leased in whole or in part to the federal government or any agency, department or unit thereof at any time between May 30, 1984 and December 22, 1994, inclusive, in which building(s) asbestos or asbestos-containing materials were present."

> ". . . a Plaintiff Class for purposes of trial consisting of all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or sub-leased their building(s) in whole or in part to the United States or any agency thereof; and, (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by U.S. Gypsum and/or U.S. Mineral Products Company and/or W.R.

> Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy with him/her or it to misrepresent or withhold from the public, knowledge of the hazards of asbestos.

When conditionally certifying the trial class, this court adopted the reasoning expressed in *Central Wesleyan College v. W.R. Grace & Co., et al*, 143 F.R.D. 628 (D.S.C. 1992), aff'd 6 F.3d 177 (4th Cir. 1993). In fact, paragraph 5D of our Order of February 17, 1995 explicitly so states.

Central Wesleyan was a class action on behalf of colleges throughout the United States whose buildings contained asbestos. Despite the plethora of individual issues pertinent to each claim, the *Central Wesleyan* courts had identified eight predominant common issues which in its view warranted class action adjudication. This was so notwithstanding the requirement of *Shutts, supra*, that the law of the locus state apply to each claim. The *Central Wesleyan* courts also felt the probability of a settlement justified conditional class certification. This Court, aware of the 24 settlements already reached, was of a similar view.

A case of similar import to *Central Wesleyan* was *In re School Asbestos Litigation*, 789 F.2d 996, at 1000 and 1009 (3d. Cir. 1986).

Throughout this litigation were two extant lawsuits of Pru and Space Center Dallas, Inc. ("Space Center") unknown to this Court and Plaintiffs' counsel.

On October 20, 1987, Pru, as owner of many commercial buildings, acting through its counsel Riker, Danzig, Scherer, Hyland & Perretti, ("Riker, Danzig") sued the trial class defendants in the Newark division of the

United States District Court of New Jersey. Its claim was based on damages incurred and to be incurred as a result of the hazardous effects of asbestos in its buildings. On March 26, 1996 it stipulated with the trial class defendants, per court approval, to limit its claims to 18 buildings, and to proceed to trial on all issues shortly after a Pre-Trial Conference on December 2, 1996.

On January 13, 1992, Space Center sued W.R. Grace, Co.-Conn., one of the four trial class defendants, in the United States District Court of Connecticut, for damages arising from the presence in its building in Dallas, Texas of asbestos which Grace had manufactured. Though it petitioned on October 4, 1996 for allowance of a late opt-out from the trial class and appealed from this Court's denial thereof, it withdrew its appeal on January 31, 1997. Hereinafter we will limit our fact presentation to matters involving Pru and not Space Center.

On February 17, 1995, this Court ordered *inter alia* that notice be sent to the settlement class describing the settlement terms with 24 defendants and scheduled a hearing date of May 19, 1995 for hearing objections and/or approving the settlements. If a class member wanted to opt out it had to file a written election to do so with the Court by April 18, 1995.

Per affidavits of Frank Barkan, C.P.A., a partner in the accounting firm of Rudolph, Palitz which handled dissemination of the notice, notices were mailed first class to 36,383 ascertained, absent, potential settlement class members (i.e., private building owners having federal tenants). With a view to notifying unascertained absent class members, he also caused, pursuant to this Court's February 17, 1995 order, a Summary Notice to appear twice in the *Wall Street Journal* and eight major metropolitan daily newspapers. This notice explained to class members how to obtain a copy of the more detailed, mailed notice and the

need to opt-out if the class member wanted exclusion from the class.

Plaintiff counsel had compiled the list of 36,383 ascertained potential class members by obtaining from the General Services Administration and the United States Postal Service names and addresses of their landlords. Pru appeared on this list seven times for seven buildings.

The introduction and paragraph 1 of this mailed notice explicitly described the certified settlement class and conditionally certified trial class by reiterating the language of the class re-certifications ordered on February 10, 1995 as amended February 17, 1995.

Barkan mailed seven notices to seven Pru buildings. Word of the 24 pending settlements in this case filtered through the Pru bureaucracy to Steven A. Lauer, a member of Pru's house counsel staff.

Subsequently, Lauer under date of April 28, 1995, executed the form to opt-out of the settlement class on behalf of Pru. 356 others had timely opted out of the settlement class. A copy of Lauer's Opt-out filed May 8, 1995 is attached hereto as Exhibit "A". No representative of Pru appeared at the May 19, 1995 fairness hearing.

On or about May 10, 1995, Lauer conferred with Robert Gilson of Riker, Danzig for advice as to how to further respond.

It appears that on that date Gilson drafted for Lauer's signature a letter directed to the Prothonotary which in essence said Pur wanted to be a member of any future class only on an *opt-in* basis after notice to Lauer. For unexplained reasons, neither Lauer nor Pru sent this letter, and, incident to Pru's petition now at issue, it submitted to us a redacted copy thereof. It claimed attorney client privilege as to the redacted portion and, in fact, withdrew the redacted draft. This draft letter is attached hereto as Exhibit "B".

On May 19, 1995, this Court approved on behalf of the settlement class settlements with the 24 settling defendants and judgment in those defendants' favor accordingly was entered May 23, 1995. There was no appeal.

At this time there were extensive discovery disputes going on between plaintiffs and defendants Grace and Gypsum. Two of these resulted in interlocutory appeals to the Superior Court. Nevertheless, by mid-April, 1996, the four trial class defendants had executed settlement agreements which ultimately substantially increased the settlement fund.

About one month after Pru had stipulated to limit its claims in the Newark case to 18 buildings, this Court on April 24, 1996, ordered that notice of settlements with the four trial class defendants be given and that a hearing thereon be held on July 24, 1996. Again, opt-outs had to be filed by July 9, 1996.

The contents of this notice and its modes of dissemination had been the subject of triangular discussions between Plaintiff lead counsel, Harvey Kronfeld, counsel for the four trial class defendants and the Special Master since February 12, 1996, when the Special Master met with counsel to review and suggest modifications to settlement agreements with the four trial class defendants and the Notice thereof to the class members.

Dissemination of the Notice included first class mail sent in early May 1996 to the 36,383 addressees (less returns) from the first mailing, notice on the internet, advertising in the same newspapers used in the first round and ads in five trade publications. Paragraph 24 of the Notice of the Settlements with the trial class defendants poignantly stated:

> "If you are already a party to another lawsuit against Grace, U.S. Gypsum, U.S. Mineral and/or Asbestospray not involving personal injury, you must nonetheless file an Exclusion Request; otherwise, you will be bound by

the Settlement Agreement and the Final Judgment Order, and your other lawsuit will be enjoined."

Of the seven notices mailed to Pru buildings the Post Office returned two. Presumptively, the other five were delivered.

Pru did not opt out as it had incident to the settlements with the 24 settlement class defendants. Pru did not appear at the settlement "fairness" hearing on July 24, 1996.

On July 24, 1996, this Court, after hearing, approved the settlements with the four trial class defendants. It noted at that hearing, 289 had opted out of the trial class. This was an important determination since the Grace and Gypsum settlement agreements were rescindable by Grace or Gypsum if there were 500 opt-outs. The Prothonotary entered judgment in favor of the trial class defendants on August 13, 1996. This judgment, *inter alia*, served as a release by the non-opting out trial class members of the four trial class defendants as to any claims asserted or assertable in the underlying class action and limited them to recovery from the settlement fund per future court order.

Upon completion of payments by September 14, 1997, this second settlement will have garnered $7,740,000 cash in addition to the $3,782,000 cash deposited in the first round of settlements for a total of $11,522,000.

Immediately after expiration of the appeal period, the four trial class defendants notified Pru of this Court's judgment ordered on July 24, 1996 and entered on August 13, 1996. They claimed this Court's judgment applied to at least 6 and possibly 8 of the 18 buildings at issue in the Newark litigation.

Pru, on September 30, 1996, petitioned for relief, labeling it as a Petition for a Declaration that It is Not a Class Member.

After (1) extensive briefing in support of and opposition to Space Center's and Pru's petitions, (2) review thereof by the Special Master, (3) an approximate 3 hour oral argument thereon on November 12, 1996, per an agenda set forth by the Special Master in his letter of November 5, 1996 to counsel (attached hereto as Exhibit "C"), and (4) further submissions at the invitation of the Special Master which he digested, this Court, after receiving the Special Master's report and reviewing pertinent documentation on November 27, 1996 denied Pru's petition. Our reasons for doing so rest on both equitable and public policy grounds. We enumerate them hereinafter.

On December 10, 1996, Petitioner Pru petitioned for reconsideration of this Court's Order of November 27, 1996 denying it relief. After the Special Master summarized Pru's supporting briefs for this Court on December 17, 1996 we denied reconsideration.

Appeal to the Superior Court followed in due course.

To clarify the issues on appeal this Court on January 3, 1997 invoked Rule of Appellate Procedure 1925(b) to require appellants to submit a ". . . concise statement of matters complained of on appeal." They did so in a timely manner.

As stated at the beginning of this opinion this Court had to determine if there were any "circumstances" justifying the relief Petitioner Pru seeks. The Petitioner has cited many "circumstances". This Court deals with them below and treats the questions they raise as subsidiaries of the initial primary question.

Further, it should be noted there are no issues of material fact which we were required to resolve and that all material facts are of record.

We are mindful of Frederick the Great's military admonition that: "To defend everything is to defend nothing." Since, however, we are dealing with a legal rather than military confrontation, prudence dictates that we

respond to every "circumstance" raised by Petitioners. The monetary stakes are substantial.

Nationwide Class Action on an Opt-Out Basis

Pru has challenged this Court's jurisdiction over it citing *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12 (1975), *cert. denied*, 429 U.S. 828, 97 S.Ct. 86 (1976) to the effect that for a Pennsylvania court to have jurisdiction over a non-resident class member he/she or it must opt-in. The explanatory note to Pa.R.Civ.P 1711 reiterates this holding.

In *Phillips Petroleum v. Shutts*, supra, however, the United States Supreme Court 10 years after *Klemow*, sanctioned the opt-out procedure adopted by this Court's order of May 7, 1993.

Certainly, on the strength of *Shutts* there can be no due process basis for concluding this Court lacks jurisdiction over Pru or any other plaintiff class member.

Though there is no factual record showing the extent to which Pru does business in Pennsylvania, this Court takes judicial notice of the fact that perusal of the Philadelphia telephone directory shows the pervasive presence in the Philadelphia metropolitan area of "The Prudential," "Prudential Preferred Properties" and "Prudential Securities Incorporated." If need arose to develop a record it is more likely than not that Pru would also be subject to this Court's jurisdiction on the ground of doing business in Pennsylvania.

Pending Litigation was not a Constructive Opt Out

Relying primarily on *McCubbrey, et al. v. Boise Cascade Home & Land Corporation*, 71 F.R.D. 62 (N.D.Cal. 1976), Pru argues that its pending lawsuit in Newark was a constructive opt-out in that it was a clearly expressed intention not to participate in the class action *sub judice*.

We reject this argument for several reasons.

Initially, we note that despite *McCubbrey* the heavy weight of located federal case law authority either by explication or implication holds that pending litigation is not a constructive opt-out from a class action.

The *McCubbrey* facts are relatively straight forward. Boise Cascade had developed recreational subdivisions. McCubbrey, as a representative class plaintiff, sued it claiming various misrepresentations incident to the sale of the subdivisions. The case settled on terms whereby a property owner could elect to be in one of three categories. One of these was to elect to opt-out, retain your property and pursue an individual remedy.

The settlement notice failed to point out that failure to opt-out bound one to one of two other settlement categories, neither of which permitted the bringing of an independent lawsuit.

20 parties instituted actions in the California state courts and Boise Cascade asked the federal court, in aid of its jurisdiction and judgment approving settlement, to enjoin the California actions.

The 20 claimants fell into three categories. The pertinent one for our consideration consisted of three parties who in response to the notice and during the exclusion period, filed lawsuits rather than an opt-out notice. The notice to them did not advise them of the consequences of failing to opt out. As to these three, the Court held they ". . . effected substantial compliance with the opt-out requirement and are thus not bound by the class adjudication."

McCubbrey, based on our research, appears to be aberrational. The Court there acknowledged that:

> "[Five cited] authorities have stressed that liberal relief from failure to follow requisite exclusion procedures will erode finality of complex adjudications, discourage class action settlements, permit return of the former option of

one-way intervention and place a burden on judicial resources."

It went on to state that courts which have insisted on strict compliance with opt-out procedures have ". . . feared that liberal relief from binding class adjudications, [or] permitting substantial or late compliance with exclusion procedures, will encourage collateral attacks on class adjudications, so that each class suit will become a hydra-headed monster triggering multiple subsidiary actions." It then in an illustrative footnote cited seven cases.

In contrast, the *McCubbrey* court could cite only one case and one commentator supposedly supportive of its view to allow liberal opt-outs.

The "strict compliance" view which this Court believes to be prudent is illustrated in a multitude cases. We cite some of them.

In 7A *Wright and Miller* §1787, page 213 the expressed view is:

"The key is that some communication of the member's intent [to opt-out] must be received *by the court* prior to the entry of judgment." (Emphasis added).

Here, though Pru received notice of the round 2 settlements, it communicated nothing to this Court.

Other cases have held explicitly that pending independent litigation regarding the issues in the class action does not constitute an opt-out. *Supermarkets General Corp. v. Grinnell Corp.*, 59 F.R.D. 512, 513 (S.D.N.Y. 1973), *aff'd. per curiam* 490 F.2d 1183 (2d. Cir. 1974) held:

"While the plaintiffs had previously instituted an independent action against Grinnell, the existence of that action did not automatically exclude plaintiffs as class members. The exclusion could only be effected by compliance with the [notice] provisions of Rule 23(c)(2)(B)."

In *Penson v. Terminal Transport Company*, 634 F.2d 989 (5th Cir. 1981) private individuals had instituted two class actions against Terminal Transport in 1972. They alleged Terminal engaged in racially discriminatory employment practices.

In 1974, Terminal discharged Penson who promptly filed an employment discrimination claim with the Equal Employment Opportunity Commission. On August 4, 1975, the trial court in the class actions approved a consent decree against Terminal in partial resolution of the class actions. After certifying a class of which Penson was a member, the Court ordered Terminal to mail notice of the consent decree to all of its affected present and former employees. Terminal did so in April 1976.

Penson got the notice, but took no action. Though the Court had ordered Terminal to advise class members of their right to opt-out, Terminal failed to include this information in the notice. It was for this reason that Penson was allowed to continue his individual action. As a matter of dicta, however, for the future guidance of Fifth Circuit Courts, the court noted at page 996:

> "Penson cites no cases which support [his] argument that the filing of the charge with EEOC prior to the consent decree accorded him a vested statutory right which could not be barred. The cases are persuasive to the contrary. *A judgment or consent decree entered in a class action can bind the absent class member even though the member had filed a claim or instituted a personal suit before the decision in the class action.* [Citing cases]" (Emphasis added)

The mailed and advertised class notice in *In re Prudential Securities, Inc.*, 164 F.R.D. 362 (S.D.N.Y. 1996) " . . . informed Class Members of the necessity to opt-out by October 30, 1995 if a Class Member desired to proceed individually with his or her claims against any of the Settling Defendants or Released Parties."

In rejecting the argument of several class members that the pendency of their individual actions entitled them to special notice the court stated at page 370:

> "It is well established that pendency of an individual action does not excuse a class member from filing a valid 'request for exclusion' [Citing] *Berman v. L.A. Gear, Inc.*, No. 91 Civ. 2653, 1993 WL 437733 at *5 n.1 (S.D.N.Y. Oct. 26, 1993), aff'd 29 F.3d 621 (2d Cir. 1994) and *Supermarkets General*, supra."

We also have noted three other decisions which did not permit opt-out because of the pendency of individual cases, similar to Pru's position in the instant case. They are:

Supermarkets General Corporation et al. v. Grinnell Corporation, et al., 490 F.2d 1183 (2d Cir. 1974);

In re National Student Marketing Litigation v. The Barnes Plaintiffs, 530 F.2d 1012 (D.C. Cir. 1976); and

Langford v. Devitt, 127 F.R.D. 41 (S.D.N.Y. 1989).

Two cases cited by Pru we deem to be inapposite.

In re Del-Val Financial Corp. Securities Litigation, 154 F.R.D. 95 (S.D.N.Y. 1994) involved a *pro se* petitioner who *received notice after* the opt-out date and wanted a late opt-out so as to continue her individual action against a non-settling defendant which she had instituted before issuance of notice. The Court allowed her to opt out late.

In re Farmers Group Stock Options Litigation, 1991 WL 332500 (E.D.Pa.) involved two floor brokers at the Philadelphia Stock Exchange who were awaiting the outcome of that exchange's disciplinary action against options writers as a prelude to their asserting individual claims. They sent an opt-out letter after the opt-out date but before the fairness hearing. The reason for their tardiness was that they *received the settlement notice after* the opt-out date. They also were allowed to opt-out.

Equitable Considerations

Paragraph 24 of the Notice to certain absent, potential class members, quoted above, is extremely specific in telling those litigating non-personal injury claims against any of the four trial class defendants that they must opt out or be bound by the settlements. To circumvent the explicit notice provision in paragraph 24 of Notice to the Plaintiff Class, Petitioner advances several arguments.

No Excusable Neglect

Pru argues that its failure to opt out of the second round of settlements as it did in the first round is a result of "excusable neglect." It focuses on *McCubbrey*, supra, to support this argument. A review of Federal Court decisions since *McCubbrey*, however, indicates that "excusable neglect" in the present context has become a legal label without meaning.

Initially, we note that determination of "excusable neglect" is within the sound discretion of the trial court and can be upset only upon a showing of abuse thereof. *Mars Steel v. Continental Illinois*, 120 F.R.D. 51 (N.D. Ill. 1988). Furthermore, to grant relief from a class action judgment on the ground of "excusable neglect", the court must conclude that the need for relief outweighs the desirability for finality of class action judgments. *In re National Student Marketing Litigation*, supra.

It is apparent to us from a review of Federal Court decisions that public policy considerations supporting finality of judgments in a class action context override whatever equitable considerations may favor a particular party's not being informed of a prospective class action judgment. *See e.g. Trist v. First Federal S&L of Chester, et al.*, 89 F.R.D.1 (E.D.Pa. 1980) where plaintiffs' class counsel, through clerical error, failed to mail notice of the settlement to 37 out of approximately 25,000 bank depositors who were

members of the plaintiff class. The court held the 37 bound to the settlement.

In this regard, a major concern of several federal courts and this Court is that when class action defendants settle they are buying, among other things, surcease from litigation a/k/a releases. Without this prospective certainty, it is questionable how many class actions would settle.

Of particular note in the instant case is that the two largest defendant payors negotiated as a condition of peace the right to upset the settlement if 500 of more than 35,000 prospective plaintiff class members opted out.

Of significance to us was the Court's observation in *In re VMS Limited Partnership Securities Litigation*, 1995 WL 355722 (N.D Ill.) that:

> ". . . in the interest of finality the class action settlement executed by the parties should not be disturbed over three and one half years after the end of the opt-out period. It is likely that if the Court were to grant Ali's Rule 60(b) motion [premised on lack of notice entitling him to relief from the class action judgment] other class members would come forward to request exclusion and the settlement would begin to unravel. . . . A too liberal application of Rule 60(b) in class actions would undermine the finality of judgments entered therein and would discourage settlement of such actions. . . . Defendants would be loath to offer substantial sums of money in compromise settlements of class actions unless they can rely on the notice provisions of Rule 23 to bind class members."

No Valid Reason for Failure to Respond

Pru next contends that its seeking to avoid the July 24, 1996 judgment against it is analogous to a petition to open a default judgment. As we explain below, we do not deem Pru's petition as analogous to a petition to open a default judgment. Even if it were, under Pennsylvania law, this

requires a showing of three elements: 1. Moving promptly to open after knowledge of the default judgment; 2. A valid reason for failure to respond to the pleading upon which default judgment was entered, and 3. A showing of a defense on the merits. *Flynn v. Casa DeBertacchi Corp.*, 674 A.2d 1099 (Pa.Super. 1996).

In our view, Pru stumbles on the second of these three required elements, viz. giving a *valid* reason for failing to respond to this Round 2 notice. It opted out of Round 1. It has not explained why at least one of the five USPS-delivered notices failed to get through to corporate house counsel. As was observed in *Supermarkets General Corporation v. Grinnell*, 59 F.R.D. 512, 514 (S.D.N.Y. 1973) *aff'd per curiam*, 490 F.2d 1183 (2d Cir. 1974):

> "The failure of the internal procedures of the plaintiffs to see that the notice reached the proper person is no excuse."

No Duty of Defendants to Inform Pru

Pru offers another reason for its failure to respond to the Round 2 notice by opting out. It says the trial class defendants had a duty to make sure notice was sent to its Newark headquarters and/or Riker, Danzig and/or Steven Lauer, Esquire. For Pru to arrive at this conclusion, it has to contort federal class action case law.

Federal decisions clearly hold that class action defendants, unless ordered by the Court, have no duty to aid in dissemination of notice to the class. 3B J. Moore & J. Kennedy, Moore's Federal Practice, ¶ 23.55 at pp. 23-432-4 (2d ed.); both *Supermarkets General v. Grinnell,* supra.; *In re VMS Securities Litigation*, 1994 WL 386397 (N.D. Ill.); *National Student Marketing,* supra., and *Langford v. Devitt,* supra., at footnote 1 citing *Moore's Federal Practice,* supra.

Hence, even if our present situation were analogous to opening a default judgment (which, as explained below it is

not) Pru has failed to offer any *valid* reason for its not responding to the Round 2 notice.

Not Analogous to Default Judgment

Furthermore, we do not agree that the opening-of-a-default-judgment analogy applies here. Why? Because a class action context is a horse of a different color.

In contrast to a default judgment situation, the class action defendant in whose favor the judgment runs has paid money for the judgment. He does not seek the judgment as a prelude to collecting money. Hence, the public policy reasons favoring finality of class action judgments come into play.

Another concern differentiating the class action judgment from the default judgment situation is that permitting a class member to avoid the judgment could encourage other class members over time doing the same thing. The Court then would be faced with a management quandary as to when to initiate distribution to qualifying class members. In other words, finality of class membership is as important an element as finality of judgment.

One may ague that the statute of limitations can tell us when individual claims no longer are justiciable and, therefore, the time frame for determining class membership is finite and determinable.

Sun Oil Company v. Wortman, 486 U.S. 717, 108 S.Ct. 2117 (1988) tells us we are free to apply Pennsylvania's statute of limitations to the claims of *class members.* Furthermore, *Today's Express, Inc., et al. v. Barkan, et al.,* 626 A.2d 187 (Pa.Super. 1993) would preclude a *class member* from asserting the "discovery rule" exception since in this case, per *Today's Express* guidelines, every class member was able to determine the presence of asbestos in his/her or its building and can be presumed to know of its deleterious effects. Hence, Pennsylvania's two-year statute of limitations would apply and begin running on August 13,

1966, when final judgment in this case was entered. 42 Pa.C.S.A. §5524(7).

Though this analysis has the appearance of providing a finality date, there is one potential argument which concerns this Court. If a class member in the future wants to opt out he/she or it may seek to avoid Pennsylvania's statute of limitations by arguing that his/her or its claim, as a non-class member who gains that status via court-approved opt-out, per *Shutts,* is governed by the statute of limitations of the locus of the claim. This argument could have validity. Faced with this potential, this Court believes it could find the instant action unmanageable since it would not know with certainty when to close the plaintiff classes.

Even if *Shutt* would not come into play regarding application of another state's statute of limitations to a potential opt out and Pennsylvania's two-year statute were the measuring period, we see no reason to delay for two years distribution to the plaintiff classes to accommodate potential opt-outs.

No Duty of Defendants to Inform Newark Court

Pru believes it was "sandbagged" by the four trial class defendants because they continued to litigate with vigor the Newark action from July 8, 1996, the end of the opt-out period, until approximately September 12, 1996 when this Court's judgment of July 24, 1996 against them became non-appealable. Pru claims the four trial class defendants knew or should have known it failed to opt-out and, per common law requirements or professional rules of conduct, had a duty to reveal to the Newark court what had occurred in Philadelphia. Had the trial class defendants promptly advised the Newark Court after July 8, 1996, Pru, so the argument goes, would have had an opportunity to appear at the July 24, 1996 hearing to request a late opt out and oppose the settlements and, if unsuccessful, appeal this Court's judgment entered against it.

We reject this specious argument on three grounds. First, as is explained below, Pru's counsel, knowing of the pendency of the trial class suit, had a duty to track the instant litigation. Pru's counsel can not shift to defense counsel the duty to keep Pru informed. Second, Pennsylvania law is very clear that the court can not graft the Professional Rules of Conduct onto the common law. Third, had any of the four trial defendants advised the Newark Court of our actions after July 8, 1995, they may have violated their duty of fidelity to the client and be subject to malpractice liability for having done so. Such a determination, however, is not now needed.

As to the first point, we find two federal class action decisions instructive and worthy of adoption. They are *In re National Student Marketing Litigation,* supra, and *Langford v. Devitt,* supra.

In *National Student Marketing* 38 former shareholders of that company (NSMC) instituted suit against it and others in New York state court on December 7, 1971 alleging they had been fraudulently induced to buy NSMC stock. Prior to that, others, making similar allegations, had instituted class actions in the District of Columbia federal district court. Three of the New York state court defendants who also were defendants in the class action asked the New York court to stay those proceedings because of the pending class action. On appeal they added another reason, namely that a motion for class action determination was *sub judice* in Washington.

Though their counsel was made aware of the District of Columbia proceedings, the 38 New York plaintiffs failed to opt out timely claiming, subsequently, they had not received notice of the pending class certification. Six months after expiration of the opt out period, the 38 New Yorker plaintiffs moved for exclusion from the Washington plaintiff class.

The Court denied their request for several reasons one of which is particularly applicable to Messrs. Gilson and Lauer, Pru's Counsel. At page 1015-6 the court observed:

> "We further note that having been informed during argument before the [New York] Appellate Division in June 1973, that a motion for class action determination was then pending in federal district court, *appellants' counsel was under a duty of diligence to keep abreast of events which so clearly affected the interests of his clients.*" (Emphasis added)

Similarly, Messrs. Gilson and Lauer, having received the round 1 notice which advised of the pending trial class litigation and having gone so far as to contemplate a request that Pru be a plaintiff-participant only on an opt-in basis, they had ". . . a duty of diligence to keep abreast of events which so clearly affected . . ." Pru's interests, and we so hold. Whether they fulfilled that duty is a judgment we do not make since such is not necessary for this adjudication.

Langford is of similar import. It was a federal court class action based on an allegedly false and misleading prospectus issued by Bioassay Systems Corp. ("Bioassay"). The Murray & Murray Pension Plan, established by the Murray & Murray law firm of Sandusky, Ohio, had purchased Bioassay stock allegedly in reliance on the prospectus. It instituted an individual action in Ohio state court. John T. Murray represented it. He acknowledged ". . . that he [was] experienced in the litigation of class actions and that he diligently followed [the class] action by reviewing the docket sheet, obtaining documents from this Court, and repeatedly requesting information regarding the status of the [class action] from the class representative."

Unfortunately, the notice to The Murray & Murray Pension Plan advising of a hearing on a proposed settlement and the right to opt-out was misdirected to Willard (not Sandusky) Ohio.

One day after the court entered an order approving the class and settlement, defense counsel wrote Murray to advise him the Murray & Murray Pension Plan Ohio action must be withdrawn because the class action Order of Final Judgment

enjoined prosecution of analogous actions. John T. Murray claimed this was the first he knew of the class certification. (Messrs. Gilson and Lauer claim the first they knew of our July 24, 1996 order was a result of the September 13, 1996 communications from Grace and Gypsum to Riker, Danzig).

The court was unsympathetic.

First it pointed out that Murray's partner, Dennis Murray, as an individual shareholder of Bioassay had probably reviewed notice of the pending class certification since John T. Murray's correspondence to defense counsel so indicated. The Court then observed at pages 44-5:

> "John T. Murray, unlike a layman, was then in a position to understand the significance and potential effects of the class action, the means available to review the details of the class action, and the legal options regarding participation in the class action."

Similarly, Messrs. Gilson and Lauer were in a position to understand the potentially adverse effects of Pru's not opting out of this class action if its individually litigated claims had greater potential.

A second facet of this argument seems to place reliance on Rules 3.3(b) and 4.1 of the Rules of Professional Conduct in that failure of the trial class defendants' lawyers to disclose developments in the instant litigation enabled their clients to commit a "fraud" upon the Newark tribunal and Pru.

This rationale, in our view, fails for two reasons. First, as explained above, Pru's counsel, not defendants' counsel, had an affirmative duty to track this action. Since defendants' counsel had no duty to speak there was no *necessity* for them to make disclosure which is a prerequisite for application of Rules 3.3(b) and 4.1.

Second, in a plurality opinion, in *In re Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215, 221 (1984) our Supreme Court stated:

> "Thus, while it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility . . . we are not inclined to extend that enforcement power and allow our trial courts themselves to use the Canons to alter substantive law or to punish attorney misconduct."

In the event there was any doubt that Pennsylvania precluded use of the Rules of Professional Conduct to advance a litigant's cause, the Supreme Court clarified its position in a 5-2 decision in *Maritrans GP Inc., et al. v. Pepper Hamilton & Scheetz, et al.*, 529 Pa. 241, 602 A.2d 1277, 1284 (1992). It there held:

> ". . . simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable in damages or for injunctive relief."

Dicta accord is also found in *Rebida v. Murasko*, 450 Pa.Super. 546 n.3, 677 A.2d 331, 335 n.3 (1996) ("the Code of Professional Conduct does not have the force of substantive law") and *In Re Block*, 425 Pa.Super. 300, 310 n.8, 6225 A.2d 57, 62 n.8 (1993) (". . . our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow Courts to alter substantive law or to punish an attorney's misconduct").

We conclude, therefore, defendants did not "sandbag" Pru. To the extent it operated in the dark, it pulled the curtain down on itself.

Potential Prejudice to the Class if Petitioners May Opt Out Nunc Pro Tunc

During oral argument before the Special Master on November 12, 1996, focusing on Petitioners' right to opt out of the Plaintiff Class *nunc pro tunc*, the Special Master

expressed concern that if there were a series of late opt outs there could potentially be two detrimental effects to the Plaintiff Class.

First, as noted above, late opt outs entail an indeterminable date for distribution of the settlement funds.

The second reason advanced by the Special Master was that if there were a series of opt-outs over time the total opt outs might increase from the 289 who had opted out by the July 8, 1996 cut-off date to 500 thereby undoing the W.R. Grace and U.S. Gypsum settlements amounting to $7,600,000.

In response to the Special Master's request of November 5, 1996 (see his letter of that date attached hereto as Exhibit "C") U.S. Gypsum placed on the record the fact that there were approximately 3,804 parties whose buildings contained asbestos presently suing it in 32 lawsuits. It was not possible to determine how many of these 3,804 would qualify as members of the Plaintiff Class, i.e. have had federal government tenants between May 30, 1984 and December 22, 1995.

Counsel for W.R. Grace on November 26, 1996 supplemented its prior submissions to this Court by pointing out that there were 2,047 private colleges and universities who were plaintiff class members in the pending class action of *Central Wesleyan* in which it and U.S. Gypsum were defendants. During the oral argument of November 12, 1995 Grace's counsel had speculated that a sufficiently large number of private colleges and universities had United States Postal Service tenants and asbestos so as to raise the possibility that more than 211 of them might seek *nunc pro tunc* opt out if Pru were so allowed to opt out and thereby "blow" the settlements with Grace and U.S. Gypsum.

Pru's counsel under date of November 25, 1996 submitted a responsive argument terming the Grace assertion "the floodgate scare." Pointing out that 10-K filings with the

Securities and Exchange Commission as of December 31, 1995 showed that Grace had 47 and U.S. Gypsum 32 asbestos property damage cases pending against them, he went on to argue:

> ". . . Out of those 79 total cases, *Mealey's* has reported that several have settled; it is necessary *to subtract* those that have settled. From the remainder, it would be necessary to subtract all of the cases that do not involve government leases. From the remainder, it would be necessary to *subtract* the duplications, where Grace and Gypsum are co-defendants in the same case. Then, out of that remainder, there would have to be *subtracted* the individual plaintiffs who have already opted out of this action. After those adjustments were made, the remaining individual defendants would be reduced to a handful."

Unfortunately, the parties at that time were unable to drape numbers on this syllogistic skeleton.

On November 27, 1996 this Court entered two orders denying Pru's and Space Center's petitions seeking permission to opt out *nunc pro tunc*.

Pru promptly moved for reconsideration. By December 8, 1996, as a result of some fast detective work with the United States Postal Service, it was able to demonstrate that as of that date, only 64 private colleges and universities in the United States had USPS leases.

Pru then argued that:

> ". . . there is no basis for defendants' opt out scare in the future . . ." (page 3 of the Brief in Support of [its] Petition for Reconsideration).

Though impressed with Pru's investigative celerity this Court is still of the belief that more than 211 potential *nunc pro tunc* opt outs may be awaiting Pru's success. We need to consider other possible late opt-outs:

1. Of America's 2,047 private colleges and universities how many had asbestos and ROTC leases between May 30, 1984 and December 22, 1995?

2. How many during that time frame had asbestos and federal tenants using their facilities for other purposes such as research?

3. Of the approximate 1760 litigants against U.S. Gypsum at the time of the November 12, 1996 oral argument who were not private colleges and universities, how many had federal tenants?

We could engage in "what ifs" interminably. We do not propose to do that. Rather, we believe that public policy, for reasons noted above, strongly favors the finality of judgments in class actions and that this Court should do nothing having the potential to risk that finality.

Estoppel

In its Appellate Rule 1925(b) Statement of Matters Complained Of, assignment of error #1, Pru rhetorically asks whether ". . . defendants W.R. Grace & Co. — Conn. and United States Gypsum Company were *estopped*, by virtue of the prior positions they took in other federal court actions, from contesting that Prudential opted-out of this class action by actively litigating its own asbestos property damage action against them in New Jersey?"

In support, Pru placed before us Grace and Grace/Gypsum briefs submitted in *NBD Bank, N.A. v. Grace and Gypsum* (U.S.D.C., E.D.Mich. No. 94-CU60111AA) and on appeal in the same case to the United States Sixth Circuit Court of Appeals, No. 95-2255. It also brought to our attention a Grace brief in *DeVries, et ux. v. Grace* (U.S.D.C., E.D.Mich. No. 94-72412).

Pru then quotes Grace/Gypsum statements from two of their briefs to the effect that when the Plaintiffs, *NBD, N.A.*

and *DeVries* instituted individual litigation against them, they voluntarily opted out of the Prince George case.

At page 4 of its brief in support of its Petition for Reconsideration [of this Court's Order of Dismissal of November 27, 1996] Pru asserts:

> "Defendants' positions estop them from *arguing* that Prudential had not effectively opted out . . . Principles of judicial estoppel will not allow this kind of inconsistently (sic)". (Emphasis added)

Our reading of the lower court opinions *NBD, N.A.* and *DeVries* would not cause us to put the same spin on the paraphrased language from the Grace/Gypsum briefs as Pru does. Those opinions seem to say that institution of the individual actions is an indication of intent to opt out. Such a determination, however, is not relevant to our decision.

Arguing that Grace and Gypsum are estopped as Pru contends, is of no moment. Why?

First, the *reductio ad absurdum* of this argument is that the law in its majesty would not permit one to change his or her mind.

Sophistry aside, the second point is, in our view, extremely important. It is that this Court has the plenary responsibility to determine class membership. Nothing that Grace/Gypsum may say or do may circumscribe or dilute this responsibility.

In a class action, the Court's posture differs from civil actions generally. In a class action, the Court is not merely a passive adjudicator but rather an active participant one of whose responsibilities is to define and certify the class. (Pa.R.Civ.P. 1708 and the criteria enumerated therein).

Faced with this reality, Pru seems to have argued in its brief for reconsideration of this Court's dismissal order of November 22, 1996 that had we known of Grace/Gypsum's stances in the Michigan cases, we would have declared that

Pru's institution of the Newark case was a constructive opt-out from the instant case.

Frankly, what Grace/Gypsum argued in the Michigan case would have had no influence on our thinking since the equitable and public policy reasons expounded elsewhere herein in support of our position still prevailed. Hence, our order of December 17, 1996 denying Pru and Space Center's petitions for reconsideration.

Our third point is that the parties in the instant action have, in our view, asserted overly broad interpretations of the concepts of judicial and equitable estoppel.

Pru, as noted above, interpreted Grace's briefs in the Detroit actions cited above as claiming that institution of individual causes of action comparable to those pending in the present class action constituted a constructive opt out of the class action. Hence, Grace could not now take a contrary or inconsistent position.

Not to be outdone, Grace, without establishing any factual basis in its initial brief, made the bold assertion that Pru is now taking positions contrary to those it took in other class action litigation. Grace could have cited *In re Prudential Securities Incorporated Limited Partnership Litigation,* supra. There the Court per the quote, supra, held that the pendency of an individual action by a class member against Pru, does not excuse him/her or it from filing a valid request for exclusion. The court also held that such a class member was not entitled to supplemental notice from Pru. One can safely assume Pru advanced arguments in support of these holdings. Such arguments would be contrary to some of those it now advances.

We believe Judge Sarokin's opinion in *Ryan Operations GP, et al. v. Santiam-Midwest Lumber Co., et al.,* 81 F.3d 355 (3d.Cir. 1996)) is an incisive explanation of the doctrines of judicial and equitable estoppel and the differences between them.

There Ryan, a homebuilder, purchased wood trim sold or manufactured by the defendants. The trim's paint and primer, after installation started peeling off and precipitated numerous complaints from home buyers. In the fall of 1991 Ryan undertook a repair and replacement program. In April 1992, Ryan sought re-organization pursuant to Chapter XI of the United States Bankruptcy Code. When filing its schedules Ryan did not disclose its potential claims against the defendants nor the potential homeowner claims against it.

In June 1992, Ryan received court authorization to hire counsel to sue unnamed people responsible for "homeowners claims."

In December 1992, Ryan sued the defendants while still in Chapter XI. In July 1993, the bankruptcy court, without knowing of Ryan's suit against the defendants nor its potential for recovery, approved a plan of reorganization. Under the plan of reorganization creditors were to ". . . receive 91 percent of any future recovery on the [defective trim] claims and. . . . suffer 91 percent of the loss if Ryan [were] unable to recover the expenses incurred in the repair and replacement program from defendants."

Relying on *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953) Judge Sarokin stated the broad definition of judicial estoppel as follows:

> "Judicial estoppel, sometimes called the 'doctrine against the assertion of inconsistent positions,' is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that (s)he has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; *rather it is designed to prevent litigants from 'playing fast and loose with the courts'*. . . . the basic principle . . . is that absent any good explanation, a party shall not be allowed to gain an advantage by litigation on one theory and then seek an

> inconsistent advantage by pursuing an incompatible theory."

Judge Sarokin refused application of the judicial estoppel doctrine against Ryan by pointing out that determination of whether a party has asserted inconsistent positions entails a two part inquiry, viz.

> "(1) is Ryan's present position inconsistent with a position it asserted in its Chapter 11 proceedings; and (2) if so, did Ryan assert either or both of the inconsistent positions *in bad faith — i.e., with intent to play fast and loose with the court.*" (Emphasis added)

Judge Sarokin found that Ryan had not acted in bad faith for two reasons. First, though it failed to disclose the potential claims against the defendants it also failed to disclose the potential homeowner claims against it. Consequently, it gained no unfair advantage. Second, Ryan permitted the creditors to be 91% contingent risk takers in the claims against the defendants. The court concluded Ryan had not acted in bad faith.

Similarly, we hold neither Pru nor Grace/Gypsum has acted in bad faith toward this Court or the Newark Court. Though not clearly articulated in *Ryan* the inconsistent positions must involve inconsistent positions of *fact*. Inconsistent legal *arguments* do not per se result in a court's allowing a party to gain an unfair advantage. Inconsistent assertions of fact, however, are akin to fraud upon the court. Judicial estoppel is intended as a remedy available to the court to prevent its being manipulated to a party's unfair disadvantage as a result of reliance upon facts which are inconsistent with or contrary to prior factual claims made to a legal tribunal. To our knowledge neither Pru nor any of the trial class defendants have made inconsistent *factual* claims pertinent to the case *sub judice*.

Equitable estoppel, as pointed out in *Ryan*, requires elements similar to fraud, viz a misrepresentation and

reliance thereon to a party's detriment. Misrepresentation can occur via silence when one has a duty to speak and the other party thereby is misled to his disadvantage. Pru asserts the trial class defendants had a duty to inform them via the Newark Court of developments in the instant case. We addressed this argument above and concluded the trial class defendants had no such duty.

At page 18 of its brief in support of its December 10, 1996 Petition for Reconsideration of this Court's Order of November 27, 1996 denying Pru's request to opt out, Pru ". . . request[ed] discovery so that the Court can address the issues which Prudential had previously reserved, including: (1) the adequacy of the settlement; (2) the appropriateness of the class certification; (3) the adequacy of representation of Prudential in the class; and (4) this Court's jurisdiction over Prudential."

Adequacy of Settlement

Pru blandly asserts that its Newark action involves a claim of more than $330,000,000. It subsumes it has a winner despite the fact that in recent years building-owner asbestos plaintiffs are encountering greater difficulty in establishing liability and damages. For asbestos to be harmful, it must be friable so that it can be inhaled. There is now some scientific opinion claiming that the odds of asbestos becoming friable are less than previously supposed and even when friable, its quantities in the air are not hazardous. Stated another way, there is continuing scientific debate over how much asbestos dust it takes to precipitate harm and what are the odds that commercial usage will precipitate asbestos dust.

These difficulty-of-proof factors were recognized by the Court when approving the *School Asbestos Litigation,* supra, settlement on September 13, 1995.

This Court considered Judge Giles' observations therein when we approved the second round of settlements on July 24, 1996.

Judge Giles had said:

> "There was great risk to the plaintiff-class if the case were to proceed. There were large school districts and others that opted out, there were trials. There was litigation by some or all of those opt-outs; *none was successful and there were verdicts in favor of the defendants.*" (Emphasis added)

Assuming the correctness of Judge Giles' statement, it is very possible to believe Pru would be better off as a member of the trial class in the instant case rather than pursuing its individual actions. Hence, even if plaintiffs' counsel and/or this Court had known of Pru's Newark lawsuits (which they did not) on July 24, 1996 it would not have caused us to reject the settlements on the ground of inadequacy.

Furthermore, it should be noted that when Mr. Gilson ostensibly drafted on May 10, 1995 Pru's request that it be allowed to participate in this case on an opt-in basis, Pru was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant.

Inappropriate Class Certification

In attacking the appropriateness of class certification, Pru apparently avers that there was not a pre-dominance of common questions. It lists 15 items which it says constitute "myriad" differences among class members. Pru's list is strikingly similar to that placed before the United States Fourth Circuit Court of Appeals in *Central Wesleyan College v. W.R. Grace Co., et al.*, supra. After due consideration of class member differences, the *Central Wesleyan* Court nevertheless conceded there were 8 predominating common factors, viz.

(1) whether defendants knew or had reason to know of the health hazards of asbestos (the "state of the art" issue); (2) whether certain categories of asbestos products (fireproofing, acoustical ceiling sprays, thermal insulation) are friable, or are capable of becoming friable as defined by federal regulations, and therefore, must at some time be removed; (3) whether defendants' asbestos products can release asbestos fiber in the course of foreseeable use, including maintenance, renovation and demolition; (4) whether defendants participated in conspiratorial activities, either industry wide or within segments of the industry; (5) whether defendants failed adequately to test their products for fiber release potential; (6) whether defendants failed to warn users of the potential hazards of their products; (7) whether defendants breached a duty of due care in selling friable asbestos products for use in colleges; and (8) whether defendants' conduct justifies the imposition of punitive damages.

This Court placed heavy reliance on *Central Wesleyan* when it decertified the original class of April 16, 1992 and established settlement and conditional trial classes per its Order of February 10, 1995, as amended February 17, 1995.

Pru also argues that when this Court certified the conditional trial class it either knew or should have known of the magnitude of Pru's Newark claim and its ability to assert it, and, therefore, should have ordered an opt-in rather than opt-out class. In support it cites Pa.R.C.P. 1711(b). Pa.R.C.P. 1711(b) provides that *if* the Court finds individual claims are substantial and the claimants have the resources to pursue them, then the court *may* require *all* class members to acquire membership via opt-in. Since this Court did not know of the existence of Pru's claims it could not have made the prerequisite finding for invocation of Rule 1711(b). Even had we known of Pru's claims we, nevertheless, could have proceeded on an opt-out basis in anticipation that Pru would

opt-out or remain in based on its perceived economic self-interest.

If we did not know, which we did not, then, Pru argues, this Court *should* have known and the lack of this information rendered ". . . the class certification defective."

Under this line of reasoning every Court managing a class action, as a condition precedent to class certification, would be required to investigate the magnitude of each class member's claim and his/her/or its resources to assert same. If that is true then class actions would no longer be viable law suits.

This Court doubts whether Pru can challenge the appropriateness of class certification post-judgment without giving notice to the rest of the trial class (at Pru's expense) so that members thereof would have an opportunity to defend this court's certification.

Inadequate Representation of Prudential

At page 28 of Pru's brief in support of its Petition for Reconsideration it offers another syllogism:

> "Defendant failed to advise plaintiffs class counsel of Prudential's existing lawsuit. Accordingly, plaintiff's class counsel was not aware of the nature and magnitude of Prudential's claims. Logically, therefore, plaintiff's class counsel could not adequately represent Prudential's interest since it did not even know what those interests were."

If the initial premise is conceded that the defendants were under a duty to advise plaintiff's class counsel then the syllogism is valid.

Contrary to Pru's assertion, defendants had no duty to advise plaintiffs' class counsel of anything pertaining to class representation if federal precedent cited above is meaningful. More particularly defendants had no duty to advise plaintiffs' counsel of Pru's pending lawsuit. Though not directly on point, the following cases augment what we said previously,

viz. that defendants have no duty to supplement class notice approved by the Court.

Georgine v. Amchem Products, Inc., 1994 WL 637404 at *12-13 (E.D. Pa. November 10, 1994), rev'd on other grounds 27 F.3d 1160 (3d Cir. 1995), *cert.* granted 117 S. Ct. 379 (1996); *In re: VMS Securities Litigation,* 1994 WL 386397 (N.D. III. July 20, 1994); *In re: VMS Limited Partnership Securities Litigation,* 1995 WL 355722 (N.D. Ill. June 12, 1995); See also 3B *Moore's Federal Practice* § 23.55 (2d ed. 1987); *In re: Prudential Securities Litigation*, supra.; and, both *Supermarkets General Corp. v. Grinnell Corp.*, supra.

If defendants have no duty to supplement class notice it follows they may rely on plaintiffs' counsel and ultimately, the Court, to effectuate the best practicable notice. Defendants have no independent duty and this Court will not impose it upon them.

Pru and Defendants Intended That Pru Opt Out

Elsewhere herein we have discussed with the question whether pending litigation by an absent class plaintiff bottomed on the cause of action asserted in the class action constitutes a constructive opt-out.

Pru has a variant on that theme, viz. because it and the trial class defendants were vigorously litigating they did not *intend* that Pru be bound by the Court's actions in this class action and, in particular, the entering of judgment against Pru.

No matter what the parties intended, such intent does not bind nor limit the Court in its plenary responsibility to determine class membership.

Such "intent" to exclude Pru from the plaintiff class may be an equitable factor weighing in favor of a late opt-out such as was sanctioned in *McCubbrey,* supra, but, as explained above, Pru's opting out in round one and being

aware of the pendency of the trial class were equitable factors now militating against late opt-out, especially when one considers public policy considerations favoring finality of judgments and fear of unraveling the settlements as discussed above.

Special Master's Actions

When appointing Daniel I. Murphy, Esquire on August 31, 1994 as a Special Master to "case manage" this matter, the Court ordered that:

> ". . . he may hold hearings and receive sworn testimony for review by the court [and he] . . . may, from time to time, apply to this Court for orders, decrees or rulings necessary to implement his commission, upon giving notice to interested parties."

Pru says the Special Master failed to notify it ". . . of the recommendations he made to the court, and the reasons for them . . ." when considering Pru's original Petition, its Supplemental Petition and its final Petition for Reconsideration.

Pru does not claim it was harmed in any way by the Special Master's alleged oversight. This, in and of itself, should dispose of this complaint.

Since, however, the Special Master's procedural correctness is being challenged, comment by this Court is appropriate.

Initially, we note that the relationship between this Court and the Special Master is such that he does not apply for anything in aid of his "Commission." His function is more that of a judicial assistant who reviews submissions by the parties and, in turn, provides precis of them to the Court. Thereafter, he may or may not recommend court action.

Of more importance, however, is the solicitude he showed for Pru in this matter. Pru had five bites at the apple, viz . . .

1. Its Brief in Support of its original petition which the Special Master digested.

2. Its Brief in Support of Its Supplemental Petition filed October 31, 1996. The Special Master digested this.

3. An oral argument of three hours duration on November 12, 1996 held before the Special Master.

4. Its letters of November 18, 25 and 26 constituting post-oral-argument facts and argument. The Special Master reviewed them.

5. Its Brief in Support of Its Petition for Reconsideration. The Special Master digested this.

It is beyond cavil for Pru now to contend that its failure to get a sixth bite at the apple harmed it.

Hunt Valley Marriott Status

In the Newark action Asbestospray, one of the four trial class defendants, has moved for summary judgment on the ground that the Hunt Valley Marriott which Pru owns or owned is included within the trial class plaintiffs because United States government agencies have used it for meetings, i.e., they were federal lessees. In the instant action, Pru asked for a contrary declaration, i.e., that the Hunt Valley Marriott is not within the certified trial class.

It is this Court's view that the Newark Court should be allowed the first opportunity to rule on this question but, if it declines to do so, this court will do so upon presentation of an appropriate record to it. As the Special Master advised the parties, determination of Hunt Valley Marriott's status probably turns on a lease-versus-license analysis. (Exhibit "C")

This Court has no record before it to enable it to make that determination. We do not know the dates of federal agency usage, the terms of federal agency usage, nor the

location of the Hunt Valley Marriott in order to apply the correct state's law as required by *Shutts,* supra.

Our main reason for deferring to the Newark Court, however, is articulated in *Langford v. Devitt,* supra. There the class member petitioner seeking and being denied late opt out had a pending Ohio state court action. The petitioner argued that the federal court where the class action was pending should allow late opt out because of the class settlement's effect in the Ohio action. The *Langford* Court concluded at page 45:

> "Although the Ohio Court cannot grant untimely exclusion from the class in the case at bar, the *effect* of this settlement on the Ohio action is for the Ohio court to determine." (Emphasis added)

As applied to the Hunt Valley Marriott, the Newark Court is free to determine the *effect* of our July 24, 1996 order terminating the confrontational aspect of this litigation. If it abstains, we will do so.

Accordingly, for the reasons set forth above, this Court's Order entered on November 27, 1996 should be affirmed and the appeal dismissed.

By the Court:

/s/ Bonavitacola, P.J.
Bonavitacola, P.J.

/s/ Daniel I. Murphy
Daniel I. Murphy, Esquire
Special Master

DATE: 3-26-97

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

PRINCE GEORGE CENTER, INC., On Behalf of Itself and All Others Similarly Situated	:	MAY TERM, 1986
	:	NO. 5388
v.	:	
U.S. GYPSUM CO., et al.	:	

SETTLEMENT CLASS EXCLUSION REQUEST

NOTE: If you wish to be excluded from the Settlement Class, you must sign and return this form by mail, postmarked on or before April 18, 1995.

DO NOT USE THIS FORM IF YOU WANT TO REMAIN A SETTLEMENT CLASS MEMBER

To: Joseph H. Evers
Acting Prothonotary
P.O. Box 59060
Philadelphia, PA 19102-9060

I acknowledge receipt of *"Notice of Proposed Settlements with Twenty-Four Defendants and Hearing to Approve These Settlements" to *all* private owners of buildilngs within the fifty states of the United States of America and the District of Columbia which were leased or subleased in whole or in part to the Federal Government or any agency, department

* but not service of; and without sufficient time to respond prior to April 28, 1995.

or unit thereof between May 30, 1984 and December 22, 1994 inclusive, in which building(s) asbestos or asbestos-containing materials were present. In response thereto, I elect to be excluded from the Settlement Class.

BY: Steven A. Lauer
Printed Name
Asst. General Counsel
Title
April 28, 1995
Date

The Prudential Insurance Company of America
Lessor to Federal Government
Law Department - 14th Floor,
751 Broad Street
Newark, N.J. 07102-3777
Address

(201) 802-3072
Telephone Number

/s/ Steven A. Lauer
Signature

EXHIBIT "B"

REDACTED
ATTORNEY-CLIENT PRIVILEGE

PRUDENTIAL RESERVES THE
ATTORNEY-CLIENT PRIVILEGE

VIA CERTIFIED MAIL R.R.R.

Mr. Joseph H. Evers
Acting Prothonotary
P.O. Box 59060
Philadelphia, PA

Re: Prince George Center, Inc. v. United States Gypsum Company, et al.
Court of Common Pleas of Philadelphia County
May Term, 1986 No. 5388

Dear Mr. Evers:

Recently a Notice regarding the above-referenced matter was sent to an office of the Prudential Insurance Company of America ("Prudential"), located in Dallas, Texas. The Notice made reference to certain "conditionally certified" classes. Included with the Notice papers was a "Settlement Class Exclusion Request" form. Prudential has already executed and submitted the Settlement Class Exclusion Request form.

I am writing this letter as a follow up to put you, the Court and counsel for the class on notice that Prudential does not wish to participate in any class or future class to be certified in the above-referenced matter *unless* I am contacted and Prudential states in writing that it will participate in such a class. I would appreciate it if you would make the appropriate record of Prudential's position. If there are any other entities or individuals whom I should notify regarding Prudential's position, please let me know.

Thank you for your anticipated cooperation. Should you have any questions, please feel free to contact me.

Very truly yours,

Steven A. Lauer

cc: Harvey S. Kronfeld
21 Bala Avenue
Bala Cynwyd, PA 19004
(via Certified Mail R.R.R.)

EXHIBIT "C"

First Judicial District of Pennsylvania
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

(LOGO)

ALEX BONAVITACOLA
PRESIDENT JUDGE
386 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-3770

November 5, 1996

Re: Prince George Center, et al. v. U.S. Gypsum, et al.
May Term, 1986 No. 5388

Dear Counsel:

Counsel for Grace asked that I consolidate or re-schedule the two conferences set for November 12. When scheduling those conferences, I had not had the opportunity to review Prudential's and Space Center Dallas' petitions nor defendants' responses thereto. Having now done so, I wish to advise you that one conference at 2:00 p.m. on November 12, 1996 in Conference Room 387 City Hall should be adequate for my purposes.

I would like, if possible, to supplement the record by noon on November 12, 1996 in the following ways:

1. Affidavits by counsel for or appropriate representatives off Grace and U.S. Gypsum stating:

a. The approximate or exact number of persons who as of July 8, 1996 were asserting in litigation building property damage asbestos claims against Grace or U.S. Gypsum, as the case may be.

b. If known, the number of such persons in 1(a) above who between May 30, 1984 and December 22, 1994 had federal tenants.

The reason for this request will be apparent when I discuss below the liberal/conservative dichotomy re late opt-outs set forth in *McCubbrey*.

2. Since the Prothonotary has returned to Mr. Kronfeld at least 1,787 mailed settlement notices which proved to be undeliverable by the Post Office, I would like his affidavit of record detailing how many of the seven notices mailed to various Prudential properties (five Prudential, one Pru or PIC and one 745) were returned. I realize under Pennsylvania law there is a presumption of delivery once a letter enters the postal stream but I do not want to rely on that.

3. Grace claims Edward Westbrook knew or should have known via discovery in the Space Center Dallas, Inc. litigation that there was a federal tenant at 1111 W. Mockingbird Lane, Dallas, TX between May 30, 1984 and December 22, 1994. That discovery may be among the multifarious exhibits piled high in our chambers but I do not propose to find the needle. Hence, via affidavit from Grace's counsel, I would like this discovery placed of record so that, in the event of an appeal, it would be a part of the record.

There is a question whether Hunt Valley Marriott had a federal tenant, and, therefore, is a member of the Trial Class. I suspect this will involve a lease-versus-license analysis. Prudential has asked this Court to "declare" that there was no federal tenant whereas Asbestospray has asked the federal court in Newark to find the opposite. I am recommending to Judge Bonavitacola that this Court defer to Newark and not rule on the request unless Judge Ackerman declines to do so. I fear there could be inconsistent finding. (My hunch is the federal government's holding conferences at Hunt Valley falls into the "license" rather than "lease" category.)

At our conference, I want to focus on two areas.

(Preliminarily, let me note I will advise Judge Bonavitacola that, in my view, the "best practicable" notice requirements of *Shutts* have been met.)

1. Permitting Space Center Dallas and/or Prudential to avoid the judgment of August 13, from a substantive standpoint, amounts to a setting aside or opening of that judgment regardless of the legal label or method employed.

Prudential argues that the judgment against it is analogous to a default judgment which, under Pennsylvania law, can be *opened* if Prudential can offer a reasonable explanation or excuse for not opting out. Query: Is this a valid analogy in a class action context where the rights of thousands of class members allegedly could be adversely affected by initiating what could be a series of judgement reversals? Also under Pennsylvania law to *set aside* a judgment requires a fatal defect or irregularity appearing on the face of the record. More specifically, as stated in *Flynn v. Casa DiBertacchi Corp.*, 674 A.2d 1099 (1996) at page 1105:

"A judgment is void on its face if one or more of three jurisdictional elements is found absent: jurisdiction of the parties; subject matter jurisdiction; or the power or authority to render the particular judgment. (Citing cases)"

Query: Is there an irregularity on the face of the *Prince George* record.

2. *McCubbrey* references a conservative/liberal dichotomy when it comes to permitting late opt-outs.

The conservative view is that deviation from exclusion procedures will erode the finality of complex adjudications (including fund distribution) and discourage class action settlements. I would like the defendants to set forth at our meeting both general policy reasons and the pregmatics of

the *Prince George* case which would warrant adoption by this Court of this conservative view.

The liberal view, per *McCubbrey,* is that any reasonable expression of a request for exclusion (e.g., pending litigation) should serve to relieve a class member from a class suit. I would like counsel for Prudential and Space Center Dallas, Inc. to advance policy reasons and the pregmatics of this case which would warrant the Court's adopting this liberal view.

You can work on the premise I have read all briefs but not their accompanying exhibits.

Sincerely yours,

/s/ Daniel I. Murphy
Daniel I. Murphy
Special Master

/cs

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

ORDER

AND NOW, this 27th day of November, 1996 upon consideration of Prudential Insurance Company of America's petition filed September 30, 1996 for declaration that it is not a class member and not bound by this Court's judgment of August 13, 1996 or, alternatively, for *nunc pro tunc* ruling that its September 20, 1996 opt-out from the Trial Class filing was timely, defendants' responses filed thereto, Prudential's supplemental petition filed October 30, 1996 as well as various affidavits filed of record at the request of Special Master Daniel I. Murphy and following a lengthy conference with all counsel before the Special Master on November 12, 1996, it is hereby **ORDERED** and **DECREED** that Prudential's Petition and supplement thereto are **DENIED.**

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.
/s/ Daniel I. Murphy
DANIEL I. MURPHY, SPECIAL MASTER

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

ORDER

AND NOW, this 17th day of December, 1996, Prudential Insurance Company's Petition for Reconsideration and Clarification filed December 10, 1996 is **DENIED.**

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

Prince George Center, Inc. and MBL Life Assurance Corp. On Behalf of Themselves and All Others Similarly Situated	:	May Term, 1986
	:	No. 5388
v.	:	
U.S. Gypsum Co., et al.	:	

FINAL ORDER AND JUDGMENT APPROVING SETTLEMENTS WITH U.S. GYPSUM COMPANY, W.R. GRACE & CO.-CONN., UNITED STATES MINERAL PRODUCTS COMPANY AND ASBESTOSPRAY CORPORATION

WHEREAS, Prince George Center, Inc. ("PGC") and MBL Life Assurance Corporation ("MBLLAC") (collectively the "Named Plaintiffs") and Defendants United States Gypsum Company ("U.S. Gypsum"), W.R. Grace & Co. - Conn. ("Grace"), United States Mineral Products Company ("U.S.Mineral") and Asbestospray Corporation ("Asbestospray") (collectively "Remaining Defendants") have entered into Settlement Agreements with respect to the claims of all members of the certified Trial Class (hereinafter, the "Settlements");

WHEREAS, the Court defined the Trial Class in its Order dated February 17, 1995, as amended on February 23, 1996, as follows:

> All private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or sub-leased their building(s) in whole or in part to the United States or any agency thereof; and (2) at any time during that period their

building(s) contained asbestos or asbestos product(s); and (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by United States Gypsum Co., W.R. Grace & Co., U.S. Mineral Products Co., and/or Asbestospray Corp., or their building(s), is/are in a State whose law permits an owner to establish joint and several liability for conspiracy or concert of action against not only the maker or seller of asbestos or asbestos product in his/her/its building(s), but also others who acted in conspiracy or concert with him/her/it to misrepresent or withhold from the public knowledge of the hazards of asbestos;

WHEREAS, this Court on April 24, 1996 and May 6, 1996 directed that notice be given to the Trial Class regarding the Settlements; and approved the forms and methods of publication of notice to be given Class Members about their right to opt out or object, and the scheduling of a hearing to determine whether the Settlements should be approved as fair, reasonable and adequate and to hear any objections thereto;

WHEREAS, Notice of the Settlements was sent by first-class mail to all known potential members of the Trial Class with deliverable addresses and a short form of such Notice was published in nine major daily newspapers, on a internet web site and in five selected real estate trade publications, advising all members of the Trial Class of their right to appear at the hearing in support of or in opposition to the proposed Settlements;

WHEREAS, plaintiffs' counsel has filed and served a complete list of all persons or entities to which Notice was mailed and the Prothonotary has filed a complete list of all persons or entities that have filed timely requests for exclusion;

WHEREAS, a hearing was held, as noticed on 7-23, 1996 to determine whether the Settlements should be approved and, prior to the hearing, proof of mailing and

publication of notice of the proposed Settlements was presented and filed.

WHEREAS, the Court has heard counsel on behalf of the parties wishing to be heard to determine whether the Settlements should be approved; and

WHEREAS, the Court has reviewed all of the submissions presented with respect to the proposed Settlements.

NOW, THEREFORE, on this 23rd day of July, 1996, it is hereby **ORDERED, ADJUDGED** and **DECREED** that

1. The term the "Named Plaintiffs" as used herein shall mean Prince George Center, Inc., and MBL Life Assurance Corporation.

2. "Grace" as used herein shall mean W.R. Grace & Co.— Conn., a Connecticut Corporation, and W.R. Grace & Co., a New York Corporation, and their predecessors, successors, assigns (including the purchasers of any of their divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present.

3. "U.S. Mineral" shall mean United States Mineral Products Company, a New Jersey Corporation, and its predecessors and successors, past and present assigns (including the purchasers of any of its divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present, but only in their capacity as such in their relationship to United States Mineral Products company and not including any other defendant remaining in this litigation.

4. "U.S. Gypsum" shall mean United States Gypsum Company, its predecessors, successors, assigns (including the

purchasers of any of its former divisions and subsidiaries), representatives, subsidiaries, divisions, affiliates, parents, partnerships and partners, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present.

5. "Asbestospray" shall mean Asbestospray Corporation, its predecessors and successors, and past and present assigns (including the purchasers of any of its former divisions and subsidiaries), divisions, affiliates, parents, partnerships and partners and Asbestos Products Manufacturing Corporation, Spraycraft Corporation and H&A Construction Corporation, and all of their officers, directors, agents, employees, insurers and attorneys, both past and present, but only in their capacity as such in relationship to Asbestospray Corporation or its majority stockholder, and not including any other defendant remaining in this litigation.

6. The term "Claims" as used herein shall mean all claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known and unknown, legal or equitable, arising out of or relating to the manufacture, sale, installation or use of asbestos-containing materials, friable or non-friable, including but not limited to all direct-to-steel fireproofing, acoustical plasters, fireproofing plasters, thermal insulation, ceiling tile, texture paints, textures, paste-spackling putties, pipe coverings, joint compounds, rigid block insulation, siding shingles, roofing products or any other asbestos-containing products manufactured by or under license from the Remaining Defendants or any of them, which contain asbestos, which the Named Plaintiffs and members of the Trial Class individually or collectively, and their predecessors or successors, transferees and assigns, or any of their past or present representatives, assignees, subsidiaries, division, affiliates, parents, partners, officers, directors, employees or agents, had, now have or hereinafter may have against Remaining Defendants from the beginning

of the world whether now existing or which may arise in the future by reason of alleged asbestos-containing material installed in Class Buildings, or any alleged contamination such material may have created or will create. The term "Claims" shall also include all claims arising out of or in any way related, in whole or in part, to facts, matters, acts of commission or omission, statements, agreements or occurrences which were or could have been asserted, alleged, described, embraced or otherwise referred to in any of the complaints and amended complaints in this action, including all claims relating to costs of inspection to determine whether such asbestos-containing materials were present, all claims relating to the costs of medical monitoring (except as a part of a course of treatment of a person who has been injured by exposure to asbestos), and all claims of conspiracy or concert of action or any other type of shared liability for asbestos-contain materials manufactured, sold or installed by other persons, *provided, however*, that the term the "Claims" does *not* include any rights the Named Plaintiffs, the Trial Class or the remaining defendants may have now or in the future concerning any claims for personal injury caused by asbestos or asbestos-containing building products in any Buildings.

7. "Class Buildings" means any building owned by the Named Plaintiffs, or any Member of the Trial Class and falling within the definition of the Trial Class as set forth above.

8. The bringing, pendency or settlement of this action shall have no effect on any buildings owned or operated by Class Members other than their Class Buildings.

9. The members of the Trial Class as defined by this Court's Order of February 17, 1995 as amended on February 23, 1996 who have not timely filed elections to exclude themselves ("Final Trial Class") are subject to personal jurisdiction of this Court for the purposes of effectuating these Settlements.

10. The Settlements are in all respect fair, adequate, reasonable and proper, are in the best interests of the Trial Class, and are approved fully.

11. The Court reaffirms the findings in paragraph 5 of the Court's February 17, 1995 Order, in which the Court concluded that, as to W.R. Grace & Co.-Conn, U.S. Gypsum, U.S. Mineral and Asbestospray, the prerequisites to a Class Action described in Pa.R.Civ.P. § 1702 have been satisfied, that the Named Plaintiffs including MBLLAC are adequate representatives of the Trial Class, and that their claims are typical of the claims of the Trial Class.

12. Notice of the proposed Settlements, as required by the Court, constitutes the best notice practicable under the circumstances and has been given in an adequate and sufficient manner, complying in all respects with applicable law, constitutional due process and in particular the Court's Orders and Pa.R.Civ.P. 1712 and 1714(c).

13. This Class Action and the Claims which were actually asserted or which could have been asserted in the Named Plaintiffs' Complaints and any amendments thereto are dismissed on the merits and with prejudice against Named Plaintiffs and the members of the Trial Class, and in favor of Remaining Defendants, without costs to any party.

14. Named Plaintiffs and each and every member of the Trial Class are deemed to have released their Claims, defined in paragraph 6 hereof, against Remaining Defendants as if they had individually executed the Release attached as an Exhibit to each Settlement Agreement and to the Class Notice, which is incorporated herein by reference and made a part hereof.

15. The members of the Trial Class as certified by this court's Order February 17, 1995, as amended on February 23, 1996, who timely filed elections to exclude themselves from the Trial Class shall not participate in the proceeds of

the Settlements hereby approved or receive any benefit thereunder.

16. U.S. Gypsum, Grace, U.S. Mineral and Asbestospray are forever released and discharged from any and all liability to the Named Plaintiffs and to any member of the Trial Class with respect to any and all Claims.

17. Subject to paragraphs 18 and 19 below and the provisions in the Settlement Agreements regarding claims for contribution and/or indemnity, this Order and the Settlements are not intended and are not to be construed as a release, dismissal or discontinuance by Named Plaintiffs and/or any Class members of any claims which any of them has or may have against any other entity or person.

18. In the event either Named Plaintiff or any member of the Trial Class commences an action against any person or entity for damages relating to the presence of asbestos in a building and the person or entity, in turn, asserts a claim for contribution or indemnity against any of the Remaining Defendants, then the plaintiff in such suit shall reduce any judgment it may obtain against any other person for asbestos-related property damage by the amount, percentage or share of such judgment attributable to the Remaining Defendants so as to bar, discharge and release under applicable law any claims for contribution or indemnity against Remaining Defendants.

19. In the event that either Named Plaintiff or any member of the Trial Class obtains a judgment against any other person for asbestos-related property damage and that person obtains a judgment over, in whole or in part, against any Remaining Defendant for contribution or indemnity, then such plaintiff shall reduce or remit any judgment or portion thereof obtained from such person by the amount of the judgment over against U.S. Gypsum, Grace, U.S. Mineral, and/or Asbestospray.

20. This Court retains jurisdiction of this matter for the purposes of ascertaining that all parties perform and discharge their obligations under the Settlement Agreements and enforcement thereof, and for the purposes of determining challenged claims, allowing administration or other expenses, making awards, including attorneys fees and expenses, distributing all settlement funds or recoveries, and any other matter incident to the administration of this action.

21. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Court Order, and the Prothonotary of this Court is directed to enter this Final Order and Judgment forthwith pursuant to Pa.R.Civ.P. 1715. Judgment is hereby entered in favor of U.S. Gypsum, Grace, U.S. Mineral and Asbestospray and against the Named Plaintiffs and the members of the Final Trial Class. The Court has made an express determination that an immediate appeal would facilitate resolution of the entire case.

By the Court:

/s/ Bonavitacola
BONAVITACOLA, P.J.

September 13, 1996

VIA FACSIMILE AND FEDERAL EXPRESS

Robert J. Gilson, Esq.
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One Headquarters Plaza
Morristown, NJ 07962-1981

Re: The Prudential Insurance Company of America v. United States Gypsum Company, et al.
Civil Action Nos. 87-4227 and 87-4238 (HAA) (D.N.J.)

Dear Mr. Gilson:

With pretrial dispositive motions due on or before October 1, 1996, we are writing to you on behalf of W.R. Grace & Co.-Conn. and United States Gypsum Company to confirm that at the present time, and based on present information, the following are the only buildings at issue in this litigation.

Buildings at issue against W.R. Grace & Co.-Conn.:

Century Center I - Atlanta, Georgia

Southdale Office Complex - Edina, Minnesota

Embarcadero II - San Francisco, California

Short Hills Office Building - Short Hills, New Jersey

Brookhollow - Houston, Texas

Northwest Financial Center - Bloomington, Minnesota

1100 Milam - Houston, Texas

Buildings at issue with respect to U.S. Gypsum:

Chatham Center - Pittsburgh, Pennsylvania

Prudential Plaza Mall - Newark, New Jersey

The other buildings are no longer at issue based on the Final Judgment Order and Release in the *Prince George Center v. U.S. Gypsum, et al.*, CCP Phila. Cty., May Term 1986, No. 5388, copies of which are enclosed. Prudential is a member of the class in the *Prince George Center* case.

If your understanding is other than as set forth above, please advise us no later than September 18, 1996. In the meantime, and only to avoid any prejudice to our respective clients, we will serve outstanding expert reports and continue discovery in accordance with the Pre Trial Order.

Very truly yours,

ANTHONY J. MARCHETTA
Attorney for W.R. Grace &
Co.-Conn.

KELL M. DAMSGAARD
Attorney for United States
Gypsum Company

Encls.
cc: All Counsel of Record

Supreme Court, U.S.
FILED
JUN 11 1999
CLERK

No. 98-1695

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION FOR RESPONDENTS UNITED STATES GYPSUM COMPANY AND W.R. GRACE & CO.-CONN.

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QUESTIONS PRESENTED

Where the state trial court directed that notice of a settlement be sent to class members by first class mail and publication, and where the state courts have found that a sophisticated class member aided by experienced counsel received actual notice of the class action on two separate occasions, should this Court grant certiorari to hear that class member's claims that it was entitled to "better than actual" notice?

Where the state trial court has found counsel to be adequate, where the appellate court has found that the issue of class counsel's adequacy had not been properly raised by a class member in the trial court and had been waived under state law, and where there is an insufficient evidentiary record to support a claim of inadequate representation, should this Court grant certiorari to hear a claim of constitutionally inadequate performance of class counsel in negotiating a settlement?

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent United States Gypsum Company states that its parent company is USG Corporation, and that there are no other publicly held companies that own over 10% of the stock of United States Gypsum Company.

In accordance with Rule 29.6 of the Rules of this Court, respondent W.R. Grace & Co.-Conn. states that its parent company is W.R. Grace & Co. which owns 100% of the stock of W.R. Grace & Co.-Conn.

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INTRODUCTION

Petitioner Prudential Insurance Company of America is dissatisfied with the settlements in this litigation and, after failing to exclude itself from the class, seeks to avoid the class action judgment by claiming that the Pennsylvania courts acted unconstitutionally. Prudential, however, did not raise below one of the two issues it seeks to raise in this Court, its assertions are contrary to the facts found by the Pennsylvania courts, and the circumstances here do not parallel those involved in the class actions discussed in Prudential's Petition.

This class action was filed in state court in 1986 and was hotly contested for the next decade. Unlike other class action settlements highlighted by Prudential, this case does not involve a settlement class. Indeed, the class was certified over defendants' vigorous objection and final settlements were reached only after intense negotiation with experienced asbestos and class-action counsel acting on behalf of the class.

Prudential contends that the notice of the settlements that was sent to it was constitutionally deficient. The Pennsylvania trial court expressly found as matters of fact, however, that: (a) Prudential and its lawyers had actual knowledge of the class action and of the potentially preclusive effect of a final judgment; and (b) Prudential received five copies of the notice of the final settlements. Hence, Prudential is necessarily arguing that, although it received actual notice, the Constitution requires better than actual notice. That is not, and never has been, the constitutional standard.

Prudential also asserts that it should not be bound by the settlements and judgment because it believes the performance of class counsel in reaching the settlements violated due process. In essence, Prudential claims that class counsel's performance was inadequate because the settlements were too low, as to Prudential, in light of Prudential's view of the value of its own claims. In so arguing, Prudential overlooks: (i) that it never objected to, or contested the fairness of, the settlements; (ii)

that the class was represented by experienced class action counsel as well as some of the nation's leading plaintiffs' attorneys in asbestos-in-buildings litigation; and (iii) that Prudential never notified class counsel of its claims (or its views of those claims) despite its knowledge of the case. Further, and perhaps most importantly, Prudential failed to raise in the trial court its claim that class counsel were constitutionally inadequate.

Prudential has conceded that "[t]he circumstances of this case are unique" and "the totality of these facts will never be repeated." This case and its unusual facts do not present a good vehicle to consider broad constitutional arguments or generalized attacks on class action abuse. Under this Court's rules and well established precedent, certiorari should not be granted.

STATEMENT OF THE CASE

A. Plaintiff Initiates The Class Action

This case was filed as a class action in 1986. The complaint alleged that plaintiff owned buildings with asbestos-containing building materials; that the presence of those materials posed a risk to health; and that the defendants (including U.S. Gypsum and Grace) should be held liable for compensatory and punitive damages.[1] Plaintiff sought to prosecute the case under Pennsylvania state class action procedures on behalf of all private owners of buildings leased to the United States government.

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1. Approximately eighteen months later, Prudential filed an action in the United States District Court for the District of New Jersey that raised similar claims. *Prudential Insurance Company of America, et al. v. United States Gypsum Company, et al.*, Civil Action Nos. 87-4227 (HAA) & No. 87-4238 (HAA) (referred to herein as "the New Jersey Case").

B. The Parties Extensively Litigate Issues Relating to Class Certification

U.S. Gypsum and Grace vigorously opposed class certification. Over their objections, the trial court granted the plaintiff's motion for class certification in 1992. Pet. App. 22a. The trial court held that the named plaintiff was an adequate class representative, that it had demonstrated the prerequisites for class certification, and that a class action was a fair and efficient means of resolving the controversy. The trial court determined that class counsel, who included Martin Greitzer, Harvey Kronfeld, the late Herbert B. Newberg,[2] Daniel Speights, and Edward Westbrook, were highly experienced in the prosecution of class actions and litigation involving asbestos in buildings; and it concluded that these lawyers would vigorously prosecute the action on behalf of the class.[3]

In 1993, defendants filed a petition in the Pennsylvania Supreme Court challenging, among other things, the certification of the class. That court declined to disturb the trial court's orders. In 1994, the case was reassigned to the highly-respected President Judge of the trial court. At that time, Grace, U.S. Gypsum and two other defendants moved for decertification of the class, but the trial court reaffirmed that the prerequisites to a class action still existed.

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2. In challenging the adequacy of class counsel in this case, Prudential repeatedly relies upon Mr. Newberg's class action treatise. Pet. 23, 24, 26.

3. In addition to other significant experience in asbestos litigation, these lawyers have played leading roles in the prosecution of two other major national asbestos-in-buildings class actions. *See In re School Asbestos Litigation*, 789 F.2d 996, 998 (CA3) (nationwide class of elementary and secondary schools), *cert. denied*, 479 U.S. 852, 915 (1986); *Central Wesleyan College v. W.R. Grace & Co*, 6 F.3d 177, 180 (CA4 1993) (nationwide class of colleges and universities). Further, Messrs. Greitzer, Speights and Westbrook have been involved extensively in asbestos-in-buildings litigation throughout the country.

C. Settlement Negotiations Begin After Substantial Discovery

Following class certification, the parties engaged in substantial discovery with an eye toward trial. A great deal of information was available to plaintiffs' counsel. After more than a decade of asbestos property litigation, class counsel had scrutinized the documents of U.S. Gypsum and Grace and deposed their employees repeatedly. They also were well aware of the strengths and weaknesses of asbestos-in-buildings claims. Scientific opinion regarding in-place asbestos-containing products had changed, and the Environmental Protection Agency and other agencies had modified their policies regarding asbestos-containing products in buildings. *See, e.g.*, S. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION, at 12-13 (1993) (discussing the development of scientific and regulatory knowledge regarding the nature of in-place asbestos-containing products). These changes benefitted the defendants in the litigation, resulting in favorable trial records for both U.S. Gypsum and Grace.[4] Against this background, the parties began to engage in settlement negotiations.

D. Prudential Actually Receives The First Class Notice

As of June 1994, settlements had been reached in this case with 24 of the 28 non-bankrupt defendants. U.S. Gypsum and Grace were not among this group. To allow final judgment to be entered on the claims against the settling defendants, the trial court modified the existing class certification to define two classes — a Settlement Class and a Trial Class. Class members could participate in either, neither, or both. The claims against the 24 settling defendants were certified as the Settlement Class, and the claims against the four non-settling defendants

4. As of 1996, U.S. Gypsum had tried 24 asbestos-in-buildings cases to verdict, 15 of which had ended in judgments in its favor, with two others settled and several remaining on appeal. Similarly, Grace had tried 16 cases on the merits since September 1989 and obtained nine jury verdicts in its favor.

(including U.S. Gypsum and Grace) were certified as the Trial Class. Pet. App. 23a-24a.

In February 1995, the trial court approved a form of notice to the class ("the 1995 Notice") that described the litigation, explained the 24 settlements and the certification of the Settlement Class, and advised class members that the Trial Class had been certified and was proceeding against U.S. Gypsum, Grace, and two other defendants. The 1995 Notice also informed class members that they were required to file a written request for exclusion if they did not wish to be included in the Settlement Class. The 1995 Notice was sent by mail to 36,383 potential class members and published in nine newspapers nationwide. The list of potential class members' addresses was created by class counsel, based upon records of federal agencies obtained under the Freedom of Information Act.

Prudential admits that it received the 1995 Notice and filed a request to be excluded from the Settlement Class.[5] Pet. App. 26a. Nothing in Prudential's request for exclusion sought exclusion from the Trial Class or instructed class counsel to provide future notices in a different manner. After a hearing, the court approved the 24 settlements and dismissed the claims against the 24 settling defendants.

On the heels of submitting its request for exclusion from the Settlement Class, and with full knowledge that it would ultimately need to take further action to avoid being bound by the adjudication of the Trial Class claims, Prudential consulted with its outside attorneys regarding its options with respect to the Trial Class. Pet. App. 26a. On or about May 10, 1995, Prudential's lawyers drafted a letter for Prudential to consider using to request exclusion from all further aspects of the case. Pet. App. 26a, 61a-62a.

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5. Prudential asserts in its petition for Certiorari that the notice that it received was "forwarded by an unrelated third party." Pet. 3. Prudential previously asserted in a verified Petition filed in the trial court that "[a] notice was sent to a Prudential office located in Dallas, Texas." Resp. App. 11a.

The draft letter is factually significant for several reasons. First, it specifically acknowledged Prudential's awareness of "'conditionally certified' classes[.]" Second, despite seeking exclusion from any certified classes, the draft letter was fashioned in an attempt to preserve Prudential's flexibility to participate if it determined the outcome of the class action to be desirable. Finally, it explicitly identified Steven Lauer, a Prudential attorney, as the person to whom any future notification should be directed. Pet. App. 61a. Based upon this draft letter and other evidence of record, the Superior Court of Pennsylvania concluded as a matter of fact that "Prudential was aware of this action and the proper method for extricating itself from it." Pet. App. 9a.

Prudential concedes, and the Pennsylvania courts found, that Mr. Lauer's draft letter was never sent to the trial court or class counsel. Pet. App. 6a, 26a. Prudential attributes this to "oversight or mistake." (Affidavit of Steven A. Lauer (October 28th, 1996), at 2 & 3.) The trial court, however, found that this was a tactical decision, noting that when Prudential's outside counsel drafted its "request that it be allowed to participate in this case on an opt-in basis, [Prudential] was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Pet. App. 52a. The Superior Court did not disturb this finding of fact.

Regardless of Prudential's reason for not sending the draft letter, it is clear that neither Prudential nor its outside counsel took any steps to notify class counsel of its claims or otherwise exclude itself from the Trial Class. Indeed, Mr. Lauer testified in an affidavit that after May 1995, he gave the case "no further thought."

E. Prudential Actually Receives The Second Class Notice

After approving the initial 24 settlements, the trial court entered a series of case management orders designed to move the claims of the Trial Class to trial. With the litigation risk becoming clearer, plaintiffs negotiated and ultimately entered

into settlement agreements with U.S. Gypsum and Grace regarding the claims of the Trial Class.

The President Judge of the trial court, assisted by a special master, took an active role in shaping the notice program for the Trial Class settlements and entered orders approving the form of the second notice to the class ("the 1996 Notice"). As with the 1995 Notice, the 1996 Notice summarized the claims and defenses in the case, described the status of the litigation, and explained the terms of the settlements. The 1996 Notice also explained the steps class members were required to take to exclude themselves from the Trial Class, including return of an enclosed written exclusion request by July 8, 1996.

The 1996 Notice warned class members that unless they requested exclusion from the Trial Class, their claims would be dismissed with prejudice and they would "be forever barred from asserting any claim against [the settling defendants] . . . by reason of alleged asbestos-containing materials installed in any Class Building owned by a Trial Class member. . . ." The 1996 Notice also stated that opting out of the prior Settlement Class or prosecuting individual litigation did not obviate the need for filing a written request for exclusion. Pet. App. 6a, 27a-28a.

Under the supervision of the trial court, the 1996 Notice was disseminated in four ways: (a) it was mailed to "each potential Trial Class Member . . . who is included in the list of names of all such potential Trial Class members last known to plaintiffs"; (b) it was published in nine major newspapers; (c) it was published in five commercial real estate trade publications; and (d) it was published on a special Internet web site. Pet. App. 27a. The list of persons to whom notice was mailed was the same list used for the 1995 Notice.

Seven copies of the class notice were sent to Prudential. Pet. App. 6a, 28a. The trial court and Superior Court found that five copies of this notice were delivered to separate Prudential

properties.[6] Pet. App. 11a. Although 289 requests for exclusion were filed before the court-ordered deadline, Prudential did not file such a request. Pet. App. 6a, 28a.

Pursuant to Pennsylvania procedure, the trial court held a settlement "fairness hearing."[7] The court reaffirmed its findings regarding class certification (including its finding that the class was adequately represented), concluded that the settlements were fair, and approved the settlements.[8] Prudential did not object to the settlements or appear at the hearing.

After the settlements became final, counsel for U.S. Gypsum and Grace promptly sought to have Prudential (which had not excluded itself) agree that those claims subsumed within the Trial Class would no longer be at issue in the New Jersey Case. Prudential refused to do so and instead initiated the proceedings in state court that led to this petition.

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6. The Superior Court's opinion incorrectly states that this occurred in May 1995, when the context of the statement indicates that the court was clearly referring to the 1996 Notice.

7. Prudential asserts inaccurately that counsel for U.S. Gypsum and Grace misled the trial court by informing it that all class members' claims "were likely 'nominal.' " Pet. 7. The brief to which Prudential refers merely described the potential weaknesses in the claims of the group of 36,000 potential class members as a whole, asserting that "some class members . . . may have suffered minimal . . . damages because of" government reimbursement and that "other class members will be unable to document actual abatement expenses. . . ."

8. The total of these settlements was $7,740,000. Prudential's assertion that the settlement will provide $125 per claimant is particularly disingenuous in light of its argument that settlements of this nature yield extremely low claim rates. *Compare* Pet. 19 *with* Pet. 23. The ultimate payment to Prudential will obviously depend on the nature and number of claims asserted. There has been no agreement between defendants and class counsel regarding fees, and the amount of fees awarded to class counsel will be determined following a hearing before the trial court in which Prudential may participate.

F. Prudential Seeks A Post-Judgment Declaration Of Exclusion From The Class

On September 30, 1996, Prudential filed in the trial court a petition for declaration that it was not a class member (the "Petition for Declaration"). Resp. App. 1a. Prudential's Petition for Declaration focused on issues not raised in its Petition for Certiorari: (1) an alleged ethical or other duty on the part of U.S. Gypsum and Grace or their counsel to help Prudential by informing its outside counsel in the New Jersey Case that it should opt out of the Trial Class; and (2) a claim that by pursuing its own litigation, Prudential should be "deemed" to have opted out. Resp. App. 15a-17a.

Prudential asserts in this Court that its Petition for Declaration raised a constitutional claim of inadequate representation by class counsel. Pet. 7. This statement is not accurate. Indeed, class counsel are mentioned only once in the Petition for Declaration, and there are no factual allegations that counsel failed to perform in a constitutionally adequate manner. In its unverified memorandum of law filed with the Petition for Declaration, Prudential devoted approximately two pages to "reserv[ing] its argument" regarding various issues that Prudential stated "need not be currently resolved."[9] Prudential devoted one paragraph to a "reservation" on the issue of adequacy of counsel. The argument that Prudential purported to reserve is not the federal constitutional argument raised in this Court, but rather whether class counsel failed to meet Pennsylvania class action standards enunciated in two Pennsylvania state court cases, *Klusman v. Bucks County Court of Common Pleas*, 564 A.2d 526 (Pa. Commw. 1989), *aff'd*, 574 A.2d 604 (Pa. 1990), and *DiLucido v. Terminix*

9. Prudential refers to language that it claims to be in its verified Petition for Declaration, but actually appears in an accompanying unverified memorandum of law. Under Pennsylvania law, there is an important distinction between a verified petition, which establishes the facts and an unverified memorandum of law, which has no such value. Pa. R. Civ. P. 206.1 & 206.3.

International, Inc., 676 A.2d 1237 (Pa. Super.), *appeal denied*, 684 A.2d 557 (Pa. 1996). Neither *Klusman* nor *DiLucido*, however, bears upon the adequacy of class counsel under the Due Process Clause; *DiLucido* is concerned with the "typicality" requirement of the Pennsylvania Rules of Civil Procedure, and *Klusman* addresses the question whether the named plaintiff, not class counsel, was an adequate representative under the Pennsylvania Rules of Civil Procedure.

Thus, Prudential's Petition for Declaration did not raise or address the constitutional adequacy of class counsel. Moreover, Prudential expressly informed the trial court that it was not seeking to attack the settlements or the judgment, stating: "the relief sought by Prudential does not implicate the final judgment" in the case. Letter from A. Raynes to Special Master Daniel Murphy (Nov. 18, 1996).

On October 30, 1996, Prudential filed a supplemental petition and supporting memorandum of law. Prudential again did not raise any issues relating to a claim of inadequate performance by class counsel, stating that as to the issues on which it had "reserved" its rights, "Prudential continues to believe that it need not address these issues at this time."

Following a three-hour oral argument, the special master asked the parties to advise the court whether further discovery was necessary. Prudential responded that "[i]n light of the unique nature of Prudential's circumstances and the discrete relief it has sought here, we believe no discovery is required to resolve Prudential's motion."[10] Prudential never asked the court to rule on its "reserved" adequacy argument.[11]

10. Prudential's response to the special master also stated that "if the Court believes Prudential's motion cannot be granted on these limited grounds, we respectfully reserve the opportunity to participate in full discovery. . . ." Prudential did not indicate what discovery it "conditionally" wished to pursue.

11. Prudential also failed to offer probative evidence in support

(Cont'd)

G. The Trial Court Denies Prudential's Requested Relief

On November 27, 1996, the trial court denied Prudential's Petition for Declaration. Prudential filed a verified Petition for Reconsideration in which it sought to press for the first time an argument regarding class counsel's performance. No averments of fact in the Petition for Reconsideration, however, addressed the issue raised in this Court that class counsel had a duty to investigate Prudential's claims or those of any of the other 36,000 class members before settling the class action. Moreover, in the brief accompanying the Petition for Reconsideration, Prudential again devoted only one paragraph to adequacy of counsel, citing only *Klusman* and *DiLucido*. As a result, Prudential again failed to raise the federal constitutional issue which it now purports to raise in this Court. The trial court denied the Petition for Reconsideration.

Prudential thereafter filed a notice of appeal to the Superior Court of Pennsylvania. Among the fifteen issues raised by Prudential was adequacy of representation "by the named plaintiffs and class counsel[.]" Pursuant to Pennsylvania procedure, the trial court issued an opinion addressing the questions on appeal identified by Prudential. With respect to the facts at issue in this Court, the trial court found as matters of fact that Prudential had actual knowledge of the class action; that it had received notice of the settlements with Grace and U.S. Gypsum; and that Prudential was responsible for its own failure to opt out, stating that to the extent that Prudential "operated in the dark, it pulled the curtain down on itself." Pet. App. 43a.

(Cont'd)
of the merits or value of its claims in the New Jersey Action. The only documents submitted to the trial court that referenced Prudential's damages were the summary sheets from expert reports in the New Jersey Case. These hearsay documents were submitted without any backup or supporting evidence. There is no evidence that these inflated damage claims bear any relation to actual damages. Nor do these numbers account for the significant defenses that exist to Prudential's claims.

On the issue of notice, the trial court held that "[o]f the seven notices mailed to [Prudential] buildings the Post Office returned two." Pet. App. 28a. Citing Pennsylvania law regarding the presumption of delivery, the trial court found that "the other five were delivered." Pet. App. 28a.

Apparently out of an abundance of caution, the trial court also addressed those issues which were untimely raised in the Petition for Reconsideration. The trial court noted that "[Prudential] blandly asserts that its Newark action involves a claim of more than $330,000,000" and assumes "it has a winner despite the fact that in recent years building owner asbestos plaintiffs are encountering greater difficulty in establishing liability and damages." Pet. App. 51a. The trial court then rejected Prudential's claim regarding adequacy of representation. Pet. App. 54a-55a.

H. The Superior Court Affirms The Trial Court

After issuance of the trial court's opinion, Prudential prosecuted its appeal to the Pennsylvania Superior Court, which affirmed the trial court's orders. The court held that only those issues "properly raised" in Prudential's original Petition for Declaration had been preserved for review under Pennsylvania law. Pet. App. 7a. Finding that the issue of adequacy of class counsel was not raised in the Petition for Declaration, the Superior Court held that the issue was not properly before it. Pet. App. 8a.

On the issue of notice, the Superior Court found that:

> Prudential had notice of the substance of this action in April 1995. It obtained the advice of counsel and was presumably aware of the ramifications of a failure to opt out of the action. It is undisputed that further notice, specifically concerning the instant settlement, was delivered to five separate Prudential properties. . . . Pet. App. 11a.

The Superior Court noted that although actual receipt of class notice is not necessary to bind a class member to a final judgment, Prudential did receive such actual notice, which the court regarded as sufficient to dispose of Prudential's claim. Pet. 16a. The court nonetheless addressed Prudential's arguments, observing that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the appropriate inquiry is whether the notice was reasonably calculated to give effective notice to the Trial Class as a whole. According to the court, the analysis was to be done prospectively, not employing an after-the-fact analysis of the facts relating to one specific class member. The Superior Court also concluded that the publication notice served as an effective supplement to the approximately 36,000 individual notices that were sent.

I. The Pennsylvania Supreme Court Denies Review

Prudential next sought review by the Supreme Court of Pennsylvania arguing, *inter alia*, that the performance of class counsel raised constitutional concerns. On December 8, 1998, the Pennsylvania Supreme Court denied Prudential's Petition for Allowance of Appeal.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PENNSYLVANIA COURTS FOUND AS A FACTUAL MATTER THAT PRUDENTIAL RECEIVED ACTUAL NOTICE

Prudential asks this Court to review the decision of the Superior Court of Pennsylvania and rule that a sophisticated party, aided by experienced counsel, that received actual notice on two separate occasions, has been deprived of its due process rights as a result of not receiving "better than actual" notice. Prudential, however, has not cited a single case from any court to support the argument that one who receives actual notice and whose lawyers know about the case has a due process right

to better notice. Even if this Court desires to address constitutional constraints concerning how notice is directed to class members, a case in which the complaining party received notice is not the proper vehicle.

A. The Evidence Of Actual Notice Is Overwhelming.

The Pennsylvania courts found *as a matter of fact* that Prudential received actual notice of the 1996 settlements and that its lawyers had been aware of the class action since at least 1995. In seeking certiorari, Prudential disputes those findings. The rules of this Court make clear, however, that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. Rule 10.

The facts found by the state courts are that Prudential actually received the 1995 Notice. Pet App. 5a, 26a. Consistent with the requirements of *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), the 1995 Notice described the action (including the certification of the Trial Class), described class members' rights, and provided each class member an opportunity to exclude itself from the Settlement Class.

Prudential was fully capable of exercising its right to opt out of the 1995 Settlement Class and, in fact, did so. The trial court found that Prudential also understood that the Trial Class was going forward, and that it was a member thereof, as evidenced by the fact that Prudential, in conjunction with its outside counsel, prepared a request that it be excluded from the case. Pet. App. 9a. In addition, the draft letter expressly asked that Prudential be provided further notice through Steven Lauer, the intended signatory. Pet. App. 61a-62a. The text of the draft letter thus directly undermines Prudential's assertion that it believed its request for exclusion form (filed in response to the 1995 Notice) was sufficient to inform the court that Prudential desired that future notice be sent to Mr. Lauer.

In mid-1996, Prudential was sent the 1996 Notice regarding the settlement of additional class claims (including claims

against U.S. Gypsum and Grace). That notice explained that the pendency of another action would not serve to exclude a class member from the Trial Class. Again, this notice actually reached Prudential. Indeed, the state courts found that five copies were delivered to Prudential's properties. Pet. App. 11a. According to Prudential, however, the 1996 Notice failed to reach the single member of its legal staff that it deemed to be the ideal recipient of the notice. For this reason, Prudential takes issue with the Pennsylvania courts' findings that it received notice.

This Court generally does not "grant a certiorari to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)). It is "appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (opinion of Stevens, J.).

This is particularly true where, as here, a lower court's factual findings have been affirmed by an appellate court. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Indeed, this Court has held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630, 635 (1967) (citations and internal quotations omitted).

Prudential has asserted no such "obvious and exceptional showing." To the contrary, Prudential asks this Court to review the evidence and discuss the specific facts of the notice afforded class members in this case. The Pennsylvania courts have consistently found that Prudential received *actual* notice — better than the "best practicable notice under the circumstances." There is simply no good reason for this Court to abandon its practice of declining to review factual findings.

B. The Notice In This Case Was Consistent With This Court's Instruction That Class Members Be Afforded The "Best Practicable Notice."

In the face of the lower courts' findings that it received actual notice, Prudential tries to transform this purely factual issue into a constitutional question. Prudential asserts that it lacks "specific guidance" about the type of notice required to satisfy due process. Pet. 12. "Guidance," however is unneccessary on the question of whether a class member who received actual notice is entitled to better than actual notice; Prudential has failed to cite any authority which supports that remarkable proposition.

Ignoring its receipt of actual notice, Prudential asserts that the lower courts' decisions concerning the notice program constituted a "misreading" of the Court's decision in *Shutts*. Pet. at 28. This Court's rules make clear, however, that certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10. In any event, Prudential makes no showing that the notice program here — first class mail to the addresses compiled by means of Freedom of Information Act requests, supplemented by broad publication[12] — was inconsistent with due process requirements enunciated by this Court.

This Court has consistently instructed lower courts that notice, when required, should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see Shutts*, 472 U.S. at 811-12.

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12. The notice included publication in nine major newspapers, five commercial real estate trade publications and on an Internet site. Pet. App. 27a. This type of publication is regularly considered a means reasonably calculated to notify absent class members. *E.g.*, *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174-77 (1974) (publication and mail together provide best practicable notice).

While token efforts or "mere gestures" do not accord with due process, *Mullane*, 339 U.S. at 315, the standard does not require a finding that every absent plaintiff actually *received* notice, "so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd. Partnership Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.), *aff'd*, 107 F.3d 4 (CA2 1996), *cert. denied*, 117 S. Ct. 2509 (1997).

The "best practicable notice" requirement is based on reasonableness — it is a fluid concept that can be applied to a multitude of factual scenarios. As such, it is necessarily flexible for application to a broad range of cases without the need for this Court to micro-manage each and every factual situation. Here, the Superior Court properly applied this Court's teaching in determining that the notice program met the constitutional standards, even if actual notice is not received. Pet. App. 14a.

Prudential also attempts to create the appearance of a conflict between the decision of the Pennsylvania Superior Court and the decisions of other courts. However, none of the cases that Prudential references involve findings of actual notice of the sort found in this case. The reference in Rule 10 to conflicts among decisions has been construed to require that there "be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE, § 4.3 at 167 (7th ed. 1993). No such conflict exists in this case.

Finally, Prudential invokes cases in which the Court evaluated the constitutional adequacy of notice to a single party (as opposed to a class). Again, however, the striking and unique facts of this case distinguish Prudential's claim. For example, Prudential cites *Robinson v. Hanrahan*, 409 U.S. 38 (1972), where this Court held that the notice was constitutionally inadequate because "the State knew that appellant was not at the address to which the notice was mailed and . . . that appellant could not get to that address since he was at that very time

confined in the Cook County jail." As is readily apparent, the facts of this case are in no way analogous to *Robinson*.

Similarly, Prudential cites *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), a case involving a probate law that allowed claims to be extinguished based solely upon published notice. Unlike this case — in which seven notices were sent by mail to Prudential — no effort at mailed notice was attempted in *Pope*. *Id.* at 491.

Prudential also compares its situation to that of an incompetent taxpayer who was known to be "without mental capacity to handle her affairs or to understand the meaning of any notice served upon her." *See Covey v. Town of Somers*, 351 U.S. 141 (1956). Prudential, however, is a highly sophisticated entity and was represented by one of New Jersey's largest law firms. It clearly had the "mental capacity" to understand the multiple notices that were actually delivered to it.[13]

Thus, the unique facts of this case place it well outside the range of constitutional concerns that this Court expressed in the cases cited by Prudential.

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13. Prudential is an odd standard bearer to advance the claims in its Petition, in that it has benefited from taking contrary positions in class actions across the country in which it was the settling defendant. *See, e.g., In re Prudential Securities Inc. Ltd. Partnership Litig.*, 164 F.R.D. 362 (S.D.N.Y.) (denying late exclusions from class settlement to individuals who lacked notice because Prudential provided an incorrect address), *aff'd*, 107 F.3d 4 (Table), *cert. denied*, 117 S. Ct. 2509 (1997).

II. CERTIORARI SHOULD BE DENIED BECAUSE PRUDENTIAL NEITHER PROPERLY RAISED NOR DEVELOPED AN EVIDENTIARY RECORD REGARDING THE ADEQUACY OF COUNSEL ISSUE BELOW AND BECAUSE THERE IS NO CONFLICT AMONG THE LOWER COURTS ON THIS ISSUE

This Court generally does not address arguments that were not the basis for the decision below, *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996). Prudential failed properly to raise below the issue of the constitutional adequacy of counsel, and the Superior Court did not reach the issue. Even if Prudential had raised the issue of constitutional adequacy of counsel, Prudential has not shown that this case presents a "flagrant misuse of class actions," Pet. 18, or, for that matter, any conduct that warrants intervention by this Court.

A. Prudential Has Failed To Preserve Its Claim That Class Counsel Inadequately Negotiated The Settlement Of The Claims Of The Trial Class.

This Court has stated that, with "very rare exceptions," it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision[.]" *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (collecting cases). Under *Adams* and the cases cited therein, Prudential has the "burden of showing that the issue [it seeks to raise] was properly presented" to the highest state court. *Id.* To meet this burden, the petitioner must specify in the statement of the case

> the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the courts . . . with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised.

S. Ct. R. 14.1(h). To the extent that the issue is not addressed by the state appellate court, there exists a presumption "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party . . . can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (citations and internal quotations omitted). Indeed, this Court has held it lacks jurisdiction to review issues raised only in appellate briefing and not decided by the appellate court. *Id.*

Prudential has failed to show that the adequacy issue it wishes to raise was properly presented in the state courts. The Superior Court explicitly held that it lacked authority to consider the adequacy of representation claim because no such claim had been presented until the petition for reconsideration, which under settled Pennsylvania procedure cannot be used to raise new grounds.[14] Pet. App. 8a (citing *In re Merrick's Estate*, 247 A.2d 786, 787 (Pa. 1968); *Provident Nat'l Bank v. Rooklin*, 378 A.2d 893, 897 (Pa. Super. 1977)). Although Prudential claims that the Superior Court incorrectly concluded that it failed to raise an issue of adequacy in its initial Petition for Declaration, a simple review of Prudential's Petition for Declaration confirms that Prudential did not present either a claim regarding the

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14. To the extent Prudential suggests it is free to raise the adequacy issue at any time during the course of the litigation regardless of whether the issue has been properly preserved, there is no support for such a contention. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (CA9 1997), cited by Prudential, has been recently withdrawn in an opinion concluding that "the absent class members' due process right to adequate representation is protected not by collateral review, but by the certifying court initially, and thereafter by appeal within the state system and by direct review in the United States Supreme Court." *Epstein v. MCA, Inc.*, 1999 WL 3595311 *7 (CA9 June 7, 1999). Moreover, the withdrawn *Epstein* opinion involved a collateral challenge in district court to a judgment based upon class counsel's inadequacy, not an effort to raise on appeal issues that were not raised in the trial court. Thus, even the withdrawn *Epstein* opinion does not support the contention that an absent class member may sidestep appellate jurisprudential rules.

adequacy of counsel's performance (constitutional or otherwise) or facts in support thereof. Resp. App. 1a.

Under Pennsylvania practice, "fact pleading" is required; it is not enough for a party presenting a petition merely to make conclusory assertions in a brief. Rather, petitioner must assert affirmatively in the verified petition those facts upon which the petitioner will rely. Pa. R. Civ. P. 206.1. It also is well established under Pennsylvania law that an issue which is not raised in a verified petition cannot be considered. *See, e.g., Warren Savings Bank & Trust Co. v. Foley*, 144 A. 84, 85 (Pa. 1928) (collecting cases); *see also Fisher v. King*, 25 A. 1029 (Pa. 1893) ("Any attempt to impeach or set aside a judgment for matters outside the record should be permitted only after a plain issue has been made up by petition verified by affidavit, with answer responsive thereto."); *see also State Camp of Pennsylvania of Patriotic Order, Sons of America v. Kelley*, 110 A. 339, 340 (Pa. 1920).

Prudential makes a further factual error in asserting that the argument raised in its Petition for Reconsideration and in the Superior Court addressed adequacy of the representation as a constitutional matter. To the contrary, as stated above, the two Pennsylvania cases Prudential cited in its state court briefs concerned Pennsylvania class action requirements; those cases did not address federal constitutional issues regarding the adequacy of counsel's performance.

In apparent recognition of its waiver problem, Prudential cites two criminal cases for the proposition that a state court may not insulate itself from Supreme Court review by avoiding a properly framed issue. The cases Prudential references, however, bear no relation to this case. The first case, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), was based upon evidence establishing that a state appellate court was only sporadically enforcing the particular procedural bar that was purported to insulate the state decision from review. There is no suggestion that this case presents a similar situation. The second, *Wright v. Georgia*, 373 U.S. 284, 289 (1963), concerned unique state procedural laws, the complexity of which caused criminal defendants routinely to be denied review of

constitutional claims. This case, by contrast, turns on the straightforward procedural rule requiring a party to raise all of its claims before a court decides the matter. Prudential's original Petition makes clear that it made a tactical judgment simply to "reserve" and not raise certain issues, including an argument relating to adequacy.

B. Even If Prudential Did Not Waive Its Adequacy Claim, It Has Not Made A Factual Record To Support That Claim.

There are sound policy reasons for this Court's requirement that an issue be raised and decided below: (1) "questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind"; (2) the state court should have the first opportunity to pass on federal challenges; and (3) the federal question might have been "blocked by an adequate state ground," making this Court's review unnecessary. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Here, Prudential has failed to create a record sufficient to support analysis of its claims.

Prudential spends a large part of its Petition discussing generally the potential for conflicts between the interests of class counsel and those of class members. These hypothetical conflicts may be of academic interest, but they bear no relation to the record in this case. The heart of Prudential's argument is that class counsel were inadequate because they failed to make a "reasonable inquiry about the existence and value" of the possible individual claims of each and every absent class member before negotiating a settlement. As such, Prudential does not contest the trial court's determinations at the time that the case was certified (and recertified) that class counsel were performing adequately. Rather, Prudential appears to argue that the performance of class counsel in settling a case is subject to an after-the-fact evaluation on the basis of individual class members' subjective beliefs about their claims. There is no reason for this Court to create constitutional standards

concerning the extent to which negotiated, arms-length settlements must conform to the subjective *post hoc* expectations of passive class members.

Further, and most importantly, Prudential presented no evidence below that would support a finding that class counsel actually failed to perform adequately in its representation of the class as a whole. Lacking factual support, Prudential has attempted to argue by inference.

Prudential claims that class counsel performed inadequately because "a two-minute Westlaw or Lexis search would have unearthed [Prudential's] claims," Pet. 19, suggesting that class counsel's failure to conduct research regarding Prudential (and the other 36,000+ potential claimants) makes the judgment unenforceable as a federal constitutional matter. Had class counsel searched in Westlaw for all cases with "Prudential" in the caption and "asbestos" in the text, it would have found thirty-six opinions (as of the date of final approval of the settlements). If class counsel had then examined the two published decisions to which Prudential refers, it would have received no information about whether the Prudential buildings at issue in the New Jersey Case included government tenants (the operative factor in determining whether a building fell within the class definition). It is hard to understand how this search could have been conducted in only two minutes, how class counsel could conduct a similar function for all of the members of the class, or how such a search was necessary in order for class counsel's performance to be constitutionally adequate.

Prudential also suggests that class counsel's performance in negotiating the settlement was constitutionally inadequate *per se*, solely due to the size of Prudential's asserted claim in the New Jersey Case. In short, Prudential argues that it cannot be bound because the settlements are not large enough as a matter of constitutional principle. Prudential, however, did not offer to the trial court any objective evidence about the merits of the claims or defenses in the New Jersey Case. Rather,

Prudential stated to the trial court, as it does here, what it subjectively believes its claim to be worth. Prudential now argues that the Constitution requires that the settlements be judged in light of this subjective belief. The trial court, however, understood the distinction between actual, demonstrated damages and unsupported claims. Moreover, the trial court specifically ruled that it would have approved the settlements even if it had been aware of Prudential's claims in the New Jersey Case. Pet. App. 52a.

Finally, Prudential implies that class counsel were the victims of an elaborate scheme by defendants to obscure Prudential's claims. This is an entirely inaccurate picture. Class counsel were well situated to understand the value and nature of Prudential's claims. Class counsel included some of the leading asbestos-in-buildings lawyers in the nation, who have been involved not only in major class actions but also in numerous asbestos cases that have been tried or settled by individual building owners. As such, they were intensely familiar with the facts and law concerning these claims and were in a strong position to evaluate the strengths, weaknesses, and value of the claims of the class as a whole.

In sum, even if Prudential had not waived any claim relating to adequacy of representation, the factual record does not support the inferences that it now seeks to have this Court draw. Accordingly, a proper record does not exist to support an inquiry into the constitutional issue that Prudential seeks to raise.

C. Even If Prudential Had Made A Factual Record Concerning Its Claims of Inadequate Counsel, There Is No Conflict Among The Lower Courts On The Issue Presented To This Court.

Apparently mindful of the general precept that in reviewing a petition for certiorari this Court considers whether the petition presents a conflict among federal courts and state courts of last resort on important issues of federal law, S. Ct. Rule 10(b), Prudential attempts to manufacture a conflict where none exists.

Prudential mistakenly suggests that *Epstein v. MCA, Inc.*, 126 F.3d 1235 (CA9 1997), *withdrawn*, 1999 WL 359511 (CA9 June 7, 1999), can be read to stand for the proposition that class counsel have a constitutional obligation to conduct an independent investigation of the claims of each individual class member prior to negotiating a settlement. Pet. 16-17.

The *Epstein* opinion, cited by Prudential, imposed no such duty on class counsel. Rather, that opinion turned largely on its unique facts — what the panel termed "an extraordinary set of circumstances." *Id.* at 1255. Those unique circumstances related, *inter alia*, to class counsel's alleged failure to evaluate the federal claims of the class as a whole and counsel's alleged denigration of those class-wide claims in order to secure a settlement. In no way did that opinion address Prudential's argument that class counsel had an obligation under the due process clause to review and evaluate *particular* class members' claims as part of the settlement process.

In any event, the *Epstein* decision cited by Prudential has been withdrawn, and the Ninth Circuit has issued a substituted opinion in which it has reversed its previous conclusion. *Epstein v. MCA, Inc.*, 1999 WL 359511 (CA9 June 7, 1999) ("*Epstein III*"). In doing so, the Ninth Circuit observed that this Court's statements in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), "in no way imply that a class member who fails to opt out is not bound until collateral review of the adequacy of representation reveals that due process has been satisfied. . . ." *Id.* at *8. According to the court in *Epstein III*, "[N]owhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation . . . , this determination is subject to collateral review." *Id.* at *6. The Ninth Circuit concluded that due process did "not support the broad collateral review that the Epstein appellants seek," and that "the certifying court is charged with protecting

the interests of absent class members." *Id.* at *7. Based on these principles, the Court held that the class members' "challenge to the adequacy of representation in the [state court class action] proceedings was answered by specific reference to the findings made on the issue in those proceedings." *Id.* at *9.

Thus, *Epstein III* fails to create any conflict with the opinion of the Superior Court. In no way does it suggest that class counsel had an obligation to evaluate Prudential's individual claim prior to settlement. Moreover, *Epstein III* fully supports defendants' position in this case because issues concerning adequacy of representation were fully litigated on multiple occasions in the state court class action.

Contrary to Prudential's argument, the lower state and federal courts are consistent in holding that counsel is not inadequate for failure "to consider the unique interests and damages" of an individual class member. *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 590 (CA3 1999). Although counsel cannot adequately represent all class members if there is a significant conflict among them, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 & n.20 (1997), a disagreement over the amount or proper division of funds in a settlement, standing alone, does not typically create such conflict. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 964 (CA3 1983); *Laskey v. International Union, United Auto., Aerospace & Agricultural Implement Workers of America*, 638 F.2d 954, 957 (CA6 1981). Thus, the dissatisfaction of some class members with class counsel's efforts does not establish a conflict. *Lazy Oil*, 166 F.3d at 590-91. The Pennsylvania Superior Court's decision is entirely consistent with the decisions of the lower federal courts.[15]

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15. Moreover, the Superior Court is not the "state court of last resort" in Pennsylvania. Thus, even if the decision below could be construed to be inconsistent with the federal decisions cited by Prudential, this case does not create the type of conflict envisioned by Rule 10(b). This is further evidenced by the distinction drawn between a "state court of last resort" and a "lower state court that is subject to discretionary review by the state court of last resort" in Rule 13.1.

III. CERTIORARI SHOULD BE DENIED BECAUSE PRUDENTIAL'S ARGUMENTS REGARDING ABUSE OF STATE COURT CLASS ACTIONS HAVE NO APPLICATION TO THIS CASE.

In an effort to come within Rule 10's "important federal question" criterion, Prudential cobbles together a mixture of law review articles, congressional testimony, and one dissenting opinion from a federal court of appeals in support of the proposition that "the proliferation of state class actions has heralded a proliferation of abuses." Pet. 10. This argument is misdirected for at least four reasons.

First, the authorities Prudential cites describe what Prudential believes to be an alleged upswing in collusive state court class actions, suggesting that state courts may be less mindful of the importance of adequacy of representation. Pet 10. This case cannot support that proposition; it involves no collusion. This was not a settlement class, or even a litigation class that settled shortly after filing. To the contrary, the case and class certification were contested vigorously by defendants for almost a decade, with their objections being repeatedly raised and overruled. The final class definition for purposes of the settlement was in no material way different from the class definition proposed by plaintiffs, opposed by defendants, and approved by the trial court over the defendants' objections on at least two separate occasions.

Second, there is no evidence that the trial court was in any way passive in its supervision of the case. In fact, the court was exceedingly active, particularly about the content and distribution of class notice. Nor is there any evidence that class counsel were other than diligent in their preparation of this case.

Third, Prudential cites no evidence suggesting that these settlements were other than arms-length transactions. The suggestion that these settlements were "a tool for cunningly destroying" Prudential's rights is utterly groundless. Defendants had no way of knowing when they agreed to these settlements

whether Prudential would choose to exclude itself. Having failed timely to object after twice receiving notice, Prudential cannot claim that this settlement was "crammed down the throats of objectors." Pet. 12.

Fourth and finally, Prudential argues that state courts are desperately in need of guidance from this Court on the proper procedures for conducting class actions. Apart from conflicting with principles of federalism, Prudential's position is starkly inconsistent with the reality of this case. Pennsylvania's class action rules are based upon Rule 23 of the Federal Rules of Civil Procedure and the Pennsylvania state courts have repeatedly emphasized their reliance on federal precedent in construing Pennsylvania's class action rules. *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451, 454 n.3 (Pa. Super. 1982); *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635, 637 (Pa. Super. 1985). The state court opinions in this case are particularly instructive in this regard as they rely almost exclusively on federal class action precedents to resolve Pennsylvania class-related issues. Thus, even if Prudential's derogatory characterization of the capabilities and motivations of state courts can be supported by one or two well chosen anecdotes, this case presents no reason to doubt the conclusion reached in the primary authority cited by Prudential: "With rare exceptions, trial judges do their jobs and certify class representatives capable of representing the interests of absent class members." *Epstein*, 126 F.3d at 1256. In this case, the class action procedure was employed in a manner wholly consistent with both federal constitutional mandates and general federal procedure.

CONCLUSION

As Prudential informed the Supreme Court of Pennsylvania, "[t]he circumstances of this case are unique" and "the totality of these facts will never be repeated." As such, any determination of the Court in this case is unlikely to have wide applicability to other cases. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX — PETITION FOR DECLARATION DATED SEPTEMBER 30, 1996

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IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

May Term, 1986

No. 5388

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY, *et al.*,

Defendants.

PETITION FOR DECLARATION THAT THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *ET. AL.*, IS NOT A CLASS MEMBER OR, ALTERNATIVELY, FOR *NUNC PRO TUNC* RULING THAT PRUDENTIAL'S SEPTEMBER 20, 1996 OPT-OUT FILING WAS TIMELY

The Prudential Insurance Company of America, and two of its wholly-owned subsidiaries ("Prudential"), by its undersigned attorneys, hereby petitions this Court for a declaration that Prudential is not a member of the class of settling plaintiffs who are bound by this Court's Order dated July 23, 1996, or, in the alternative, for a *nunc pro tunc* ruling that Prudential's September 20, 1996 opt-out notice was timely.

Prudential is a mutual company, incorporated in New Jersey, and has always had its corporate headquarters in Newark, New Jersey. It is not a Pennsylvania resident. Prudential makes this petition because it is not a member of the class. Further, for the past ten years Prudential has been engaged in an asbestos-property-damage action involving claims for several hundred million dollars in the United States District Court for the District of New Jersey (the "New Jersey Action").

Appendix

In March 1996, Prudential and all defendants in the New Jersey Action signed a Consent Order stating that 18 specifically-identified properties were the subject of the New Jersey Action and that all issues concerning those 18 properties would be ready for a comprehensive trial by December 1996. Since then, all parties have spent millions of dollars preparing for that trial in the New Jersey Action.

On September 13, 1996, however, two of the defendants in the New Jersey Action — United States Gypsum Company and W. R. Grace & Co. — announced for the *first time ever in the New Jersey Action* that they contend that claims relating to eight of the 18 properties (which are worth over $100 million) were settled as part of the settlement in this Pennsylvania state court class action.

This petition is therefore of extreme urgency. In support of this Petition, Prudential avers as follows:

A. *The New Jersey Action*[1]

1. In October 1987, Prudential filed the New Jersey Action in the United States District Court for the District of New Jersey against seven former manufacturers of asbestos-containing building products to recover the several hundred million dollars in costs Prudential has incurred and will incur in monitoring, removing and dealing with the defendants' asbestos-containing materials in specifically

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1. The facts are set forth in greater detail in the affidavits of Steven A. Lauer and Prudential's Counsel and the exhibits attached thereto, filed with this Petition.

identified properties. The current active defendants are United States Gypsum Company, W. R. Grace & Co., United States Mineral Products Company and Asbestospray Corporation (the "Active Defendants").[2] Two of those defendants — W. R. Grace and U. S. Gypsum — are represented by the same counsel in both the New Jersey and Pennsylvania Actions. Prudential has already spent more than $15 million litigating the New Jersey Action, which includes Federal RICO claims and common law and state (New Jersey) claims.

2. Originally the New Jersey Action involved claims related to asbestos-containing materials in 61 properties. The complaints listed, by name and address, each of the properties at issue in the litigation. In 1991, Prudential voluntarily dismissed the claims related to 22 properties, leaving 39 properties at issue.

3. On *March 26, 1996*, the United States District Court in the New Jersey Action entered an Order Establishing A Final Pretrial Schedule ("Pretrial Order"). In that Pretrial Order, with the *express written consent* of all parties:

> (a) Prudential voluntarily dismissed claims related to an additional 20 properties against the active defendants United States Gypsum Company, W.R. Grace & Co., United States Minerals Products Company, and

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2. Three other defendants — National Gypsum Company, Celotex Corporation, and Keene Corporation — had already filed for bankruptcy.

Asbestospray Corporation (the "Active Defendants").

(b) Prudential and defendants stipulated that "[t]he claims which *remain* against the active defendants involve claims relating to asbestos-containing materials alleged to be present in the eighteen (18) properties listed below . . . ." (emphasis added). The Order then went on to list by *name and address* the 18 properties remaining at issue.

(c) Certain defendants waived their rights to contest the issue of product identification related to all or substantial portions of nine of the 18 properties which remained at issue.

4. The Pretrial Order then went on to set forth an intense schedule under which all remaining discovery would be completed and the case would be fully pre-tried and ready for a comprehensive trial addressing *all* issues in *all* 18 remaining properties by December 2, 1996. Specifically, paragraph 9 of that Pretrial Order states:

> A final Pretrial Conference shall be held on December 2, 1996. At that conference, the final Pretrial Order will be entered and a date for *a comprehensive trial addressing all issues (including liability and damages) relating to all [18] properties identified in paragraph 3 of this Order shall be set* as soon thereafter as the schedule for the Court permits. (Emphasis added).

5. The Pretrial Order was the subject of extensive negotiations by the parties in February and March, 1996, under the direct supervision and with the direct participation of the United States Magistrate Judge. In the eight years of litigation leading up to 1996, the parties had engaged in massive discovery, including: (a) Prudential responding to 22 sets of interrogatories, containing over 700 individual interrogatories; (b) Prudential responding to 13 document demands and producing hundreds of thousands of pages of documents; and (c) defendants conducting over 260 depositions and receiving transcripts of almost 80 other depositions. The parties had also filed numerous motions on the pleadings and a series of summary judgment motions, as well as proceeding before the Third Circuit Court of Appeals.

6. Concerned with bringing to trial the merits of this tremendously expensive litigation, Prudential brought a motion in December 1995, for an immediate separate trial on its claims related to a subset of less than all properties. Defendants opposed that motion for an immediate limited trial, and instead argued for the completion of all remaining discovery on all properties and a trial in December, 1996.

7. The Order Establishing A Final Pretrial Schedule was the resulting compromise. The first four paragraphs of that Pretrial Order were consented to by all active parties, including defendants, *United States Gypsum*, *W.R. Grace*, U.S. Mineral Products, and Asbestospray. In paragraphs 1 and 2, Prudential voluntarily dismissed claims relating to 20 properties against the defendants. In March 1996, when Prudential took that action, defendants knew that Prudential

claimed to have suffered damages of approximately $30 million in the 20 properties it was voluntarily dismissing. Prudential's dismissal was in exchange for a Pretrial Order establishing a firm schedule to have the remaining claims ready for *a comprehensive trial addressing all issues in all 18 remaining properties in December 1996.*

8. Following the entry of the Pretrial Order on March 26, 1996, Prudential and defendants engaged in additional massive and intense discovery related to all 18 remaining properties at issue in the action. In accordance with the Order, the discovery which has taken place between March, 1996 and September, 1996 has included:

(a) 11 sets of interrogatories served by defendants, 9 sets of which had over 200 specific interrogatories directed to the properties at issue in this action;

(b) physical inspections by defendants and their experts of the properties at the various property locations throughout the United States;

(c) multiple separate document reviews at the various properties, during which defendants demanded and received over 750,000 pages of additional documents from the various properties;

(d) over 130 additional depositions noticed by defendants, many of which were specifically

identified by defendants as dealing with property-specific issues;

(e) the identification of 33 experts by the parties and the production of multiple and voluminous expert reports. Those expert reports, including the written reports produced by defendants on September 1, 1996 and September 16, 1996, expressly addressed building-specific issues on all 18 properties at issue in this action.

9. On September 13, 1996, counsel for two of the defendants in the New Jersey Action — U.S. Gypsum and W. R. Grace — announced for the first time ever that they contended that claims related to eight of the 18 properties in the New Jersey Action, which are worth over $100 million, had been settled as part of the settlements in this Pennsylvania state court class action.

10. Despite that contention, the intensive discovery, including the property-specific discovery as to all 18 properties, is still ongoing in the New Jersey Action. In accordance with the Pretrial Order that discovery is scheduled to be completed by October 31, 1996. In fact, at depositions as recently as September 25, 1996, counsel for defendants, including counsel for W.R. Grace and U.S. Gypsum, have *specifically identified by name all 18 properties as the building which are at issue* in the New Jersey Action and have *repeatedly asked questions about all 18 properties*. Twenty-four more depositions are currently scheduled to take place in October, 1996, and

additional discovery remains to be scheduled. Those depositions will continue to address issues specific to all of the 18 properties involved in the New Jersey Action.

B. *The Pennsylvania Action*

11. Prudential has investigated defendants' recently announced contention and, to date, has learned the following about this Pennsylvania action.[3]

12. In May 1986, *Prince George Center, Inc. et al. v. United States Gypsum Company, et al.* (the "Pennsylvania Action" or the "Class Action") was filed in the Court of Common Pleas of Philadelphia County.

13. The first time a class was certified was April 1992. The class was described as:

> all private owners of a building or building(s) (within the District of Columbia and the 50 states) that were leased or sub-leased in whole or in part to the federal government, or an agency, department or unit thereof, on or after May 30, 1984, in which building(s) asbestos-containing material was or is present.

14. Apparently no notice concerning that class certification was sent out at that time to any potential class member.

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3. Since Prudential was not a party to the Pennsylvania action, and has only recently begun to investigate a rather lengthy record, it is summarizing the relevant facts as it now understands them. Prudential reserves the right to supplement its Petition.

15. In February 1995, the Court decertified the class which it had certified in April 1992, and certified a "Settlement Class" and "Conditionally Certified" trial class.

16. The "Settlement Class" related to settlements in the amount of approximately $3.8 million previously entered into between the plaintiffs in the Class Action and 24 defendants other than the four Active Defendants, that is, other than U.S. Gypsum, W. R. Grace, United States Mineral Products Company and Asbestospray Corporation.

17. The "*CONDITIONALLY CERTIFIED*" trial class consisted of:

> all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or subleased their building(s) in whole or in part to the United States or any agency thereof; and (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by United States Gypsum and/or U.S. Mineral Products Company, and/or W.R. Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy

> with him/her or it to misrepresent or withhold from the public, knowledge of the hazards of asbestos. . . .

18. In the February 17, 1995 Order, the Court also stated:

> Since all parties agreed that one or more of the four non-settling defendants [United States Gypsum, W.R. Grace, U.S. Mineral Products Company, and Asbestospray] may be liable only if: (1) a class member's building(s) contained an asbestos product or product manufactured, sold or installed by it (them) *or* (2) a class member's building is a state whose law permits imposition of liability upon it (them) upon a theory of concert of action or conspiracy with the party who made, sold or installed the asbestos product in a class member's building even though its (their) product(s) is (are) not in a class plaintiff's building, the trial class has been conditionally re-certified to reflect this reality.

19. In March 1995, a "Notice Of Proposed Settlement With Twenty-Four Defendants And Hearing To Approve These Settlements," was sent out to some tens of thousands of potential class members.

20. The notice stated that the proposed settlement class was an opt-out class.

21. A notice was sent to a Prudential office located in Dallas, Texas. That notice was later forwarded internally

to Prudential's Headquarters in Newark, New Jersey, and an Exclusion Request was sent to and *received by* the Court in April 1995. That Exclusion Request identified Mr. Lauer as the Prudential spokesman concerning the Class Action and set forth his address and title. (*See* Affidavit of Steven A. Lauer.)

22. Prudential believes that in May 1995, it sent out a letter request to be excluded from "any class or future class to be certified" in the Class Action. Prudential's available records do not yet confirm that this request was actually mailed out and its recent search of this Court's file did not disclose receipt of the May 1995 opt-out request. (*See* Affidavit of Steven A. Lauer.)

23. On October 10, 1995, United States Gypsum entered into a Settlement Agreement with the named plaintiffs in the Class Action for a promise of future payment of $ 3.6 million.

24. On February 28, 1996, W.R. Grace entered into a Settlement Agreement with the named plaintiffs in the Class Action for promise of future payment of $4 million.

25. On March 15, 1996, *plaintiff's counsel in the Class Action hand-delivered to the Court and to counsel for defendants U.S. Gypsum, W.R. Grace, U.S. Mineral Products Company, and Asbestospray, a "list of names and last known addresses of potential trial class members."*

26. On April 24, 1996, the Court entered an "Order Approving Notice and Summary Notice of Proposed Trial

Class Settlements And Of A Hearing On The Final Approval Of The Settlements." That Order concerned the settlements which United States Gypsum had entered on October 10, 1995 and W.R. Grace had entered into on February 28, 1996.

27. The Notice stated that it was an opt-out class, but did *not* state what buildings it covered; Prudential has owned over 1000 buildings at various times and it is still uncertain which of those buildings are allegedly included.

28. Notices were apparently sent out.

29. *No Notice* was sent to Prudential's Assistant General Counsel who executed and filed the Exclusion Form a year before.

30. *No Notice* was sent to Prudential's Headquarters.

31. *No Notice* was sent to Prudential's counsel-of-record in the New Jersey Action. (See Part B of this Petition, *infra.*)

32. The name "Prudential" appears on the list of names and last known addresses of potential class members several times. None of the listed addresses are for Prudential's Newark, New Jersey Headquarters; rather, the addresses are for locations in Boston, Massachusetts, Chicago, Illinois, Portland, Oregon, and Southfield, Michigan. At present, Prudential has not been able to confirm that any of those notices were received. It is clear, however, that *none of those Notices* ever found their way to Mr. Lauer, to Prudential Headquarters, or to outside counsel responsible for the conduct of the New Jersey Action.

33. The Court Order entered on April 24, 1996, required notice to be sent to "any additional potential Trial Class members whose name and deliverable addresses since March 15, 1996 become known to plaintiffs."

34. On August 13, 1996, the Court entered on its docket a Final Order and Judgment Approving A Settlement with United States Gypsum, W.R. Grace, United States Mineral Products Company, and Asbestospray Company ("Settlement Order"). The Settlement Order bore a date of July 23, 1996.

35. If that Order were treated as a final judgment, the 30-day time for appeal would have expired at the end of business on September 13, 1996.

36. At 5:02 p.m. on September 13, 1996, the 30th day after the August 13 Order was entered, a fax letter of counsel for United States Gypsum and W.R. Grace, contending that Prudential is a member of the Pennsylvania state court class, was sent to the counsel responsible for prosecuting Prudential's New Jersey Action.

37. One week later, on September 20, 1996, following some preliminary investigations, Mr. Lauer executed the opt-out form on behalf of Prudential and it was filed with this Court on that same date. (See Affidavit of Steven A. Lauer.)

Appendix

C. *Defendants' Failure to Disclose the Class Action Developments*

38. None of the defendants, or their attorneys, disclosed any of the developments in the Pennsylvania Action to either Prudential or its attorneys in the New Jersey Action. For example,

(a) No mention was made during any of the negotiations or discussions leading up to or involving the entry of the Order Establishing A Final Pretrial Schedule, which was entered in the New Jersey Action on March 26, 1996.

(b) No mention was made during any of the Court conferences, which took place between March and September 1996, when the Court, usually at the request of the defense counsel, dealt with issues relating to the buildings defendants now claim were already settled in the Class Action.

(c) No mention was made when the Court in June, 1996 granted the pro hoc admission of a partner of the Hoyle, Morris & Kerr firm to represent W.R. Grace in the New Jersey Action; that firm is also counsel of record to W.R. Grace in the Class Action.

(d) No mention was made at any time in April, May and June, 1996 while Prudential was responding to hundreds of Interrogatories served by defendants which requested information from the very buildings defendants now claim were already settled in the Class Action.

(e) No mention was made at any time in April, May and June, 1996 when defendants conducted numerous documents and physical inspections at some of the very buildings defendants now claim were already settled in the Class Action.

(f) No mention was made at any time in April, May, June and July, 1996 when defendants demanded and received the production of hundreds of thousands of pages of additional documents related to some of the buildings defendants now claim were already settled in the Class Action.

(g) No mention was made at any time during June through September 12, 1996, when defendants attended over 65 depositions conducted in the New Jersey Action and when defendants asked numerous questions related to most, if not all, of the buildings defendants now contend were already settled in the Class Action.

(h) No mention was made at any time during March through August, 1996 when defendants knew Prudential's experts were preparing extensive and detailed expert reports addressing all of the eight buildings defendants now claim were already settled in the Class Action.

(i) No mention was made at any time during August, 1996 when Prudential had produced its expert reports addressing issues on all 18 properties at issue in the New Jersey Action and when

defendants demanded over 80,000 pages of additional back-up documents to Prudential's expert reports, a large volume of which related only to the nine buildings defendants now claim were already settled in the Class Action.

(j) No mention was made at any time before September 12, 1996, when defendants produced their own expert reports, which reports directly address issues involved in the eight buildings defendants now claim were already settled in the Class Action.

(k) In fact, at depositions as recently as September 25, 1996, defendants stated that all 18 buildings were at issue.

39. Simultaneously with filing this Petition in this Pennsylvania Action, Prudential has filed motions with the United States District Court in the New Jersey Action. The motions in the New Jersey Action seek declaratory and equitable relief for reasons separate from the grounds for the Petitions in this action. The motions in the New Jersey Action, moreover, do not challenge or seek to undo the judgment in this Pennsylvania Action.

WHEREFORE, Prudential respectfully requests that this Court declare that Prudential is not a member of any class in this action and is not bound by any settlement or judgment in this class action. In addition or, in the alternative, Prudential requests a *nunc pro tunc* ruling that Prudential's September 20, 1996 Exclusion Request was timely and excluded Prudential from this class action.

Prudential also requests any additional relief this Court deems appropriate.

Prudential respectfully requests oral argument on this Petition.

RESPECTFULLY SUBMITTED,

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DATED: September 30, 1996

Appendix

VERIFICATION

I, STEVEN A. LAUER, hereby state that I am an Assistant General Counsel to The Prudential Insurance Company of America, and as such I am authorized to make this Verification on its behalf and on behalf of two of its wholly-owned subsidiaries, PIC Realty Corporation and 745 Property Investments. I verify that I have read the foregoing Petition, and the facts set forth therein are true and correct to the best of my knowledge, information and belief.

I understand that the statements made herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: September 30, 1996

s/ Steven A. Lauer
STEVEN A. LAUER

Supreme Court, U.S.
FILED
JUN 11 1999
CLERK

No. 98-1695

IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENTS CLASS PLAINTIFFS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6 STATEMENT

Neither Respondent Class Plaintiff has a parent corporation, and no publicly held company owns 10% or more of the stock of either Respondent.

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Respondents Class Plaintiffs Prince George Center, Inc., and MBL Life Assurance Corporation ("Respondents") oppose Prudential Insurance Company's ("the Pru") *certiorari* petition because its alleged loss of property was not by reason of any asserted Due Process Clause violation in the Pennsylvania courts, but rather the direct consequence of the Pru's own grossly negligent failure to protect its property by following simple state court procedure. The Pennsylvania trial court, having heard the facts, "declined Prudential's petition in equity to afford it relief *from its own failure to avoid a judgment entered against it*." Petition at 10a (emphasis added). In what the Pru concedes is a "unique" and thus a highly fact-specific case, the reality of the lower courts' findings is that despite its receiving from the Pennsylvania courts *the full measure of Due Process*, the Pru has been its own worst enemy, as to which plight this Court's writ is, we submit, unavailing. Joining in full the separate, joint opposition filed by co-respondents, Respondents wish to emphasize two fundamental reasons why the Pru's petition must be denied.[1]

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1. Co-respondents U.S. Gypsum and W.R. Grace are two of the four defendants with whom the class plaintiffs/respondents settled on behalf of what the lower court called the "trial class." *See* Petition at 23a-24a (hereafter "Trial Class" to avoid confusion). Co-respondents also oppose the Pru's petition. Respondents hereby join in the reasons for denying the petition expressed in co-respondents' joint brief in opposition.

REASONS FOR DENYING THE WRIT

I. NEITHER OF THE QUESTIONS PRESENTED, WHICH ARE BASED UPON AN ASSERTED LOSS OF PROPERTY BY REASON OF ALLEGED DUE PROCESS CLAUSE VIOLATIONS IN THE STATE COURTS, IS BEFORE THIS COURT, BECAUSE THE ALLEGED LOSS OF PROPERTY HERE IS EXCLUSIVELY THE RESULT OF PETITIONER'S OWN INEXCUSABLE FAILURE TO PROTECT ITSELF BY FOLLOWING THE SIMPLE STATE OPT-OUT PROCEDURE SET FORTH IN THE COURT NOTICES IT RECEIVED.

The fundamental premise of the petition is that this matter is an appropriate vehicle for addressing in omnibus fashion the constitutional rights of absent class members in nationwide class actions situate in state courts. The facts of record, however, belie that premise. At its core, this private dispute merely concerns the Pru's own inexplicable but nonetheless inexcusable failure, after receiving formal court notices, to take appropriate steps to avoid the compromise and extinguishment, by the subject Pennsylvania state court Trial Class action settlement and judgment, of the Pru's individual asbestos-property-damage lawsuit in New Jersey federal court against four asbestos manufacturers, who were also Trial Class defendants below, including co-respondents Grace and U.S. Gypsum.

The Pru's petition asks this Court to convene improperly as a *third* court of appeals to review alleged "errors," including alleged factual errors, following review

by both appellate courts in Pennsylvania. *See National Collegiate Athletic Ass'n v. Board of Regents*, 458 U.S. 613, 623 (1984) (noting Court's "reluctance to disturb findings of fact concurred in by two lower courts"). Equally important, the Pru invites this Court to do so on bizarre facts concerning the Pru's gross misfeasance (and Pru's in-house and outside counsel's inadequate representation of the Pru) in failing to respond timely to formal court notices and thereby execute its ostensible intent to opt out of the Pennsylvania class action so as to preserve its New Jersey lawsuit. *See, e.g., Vasquez v. United States*, 454 U.S. 975, 977 (1981) ("appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases").

Even the Pru has conceded that "the totality of these facts will never be repeated" and that the "circumstances of this case are unique." [2] So desperate was the Pru's plight in the wake of its inexcusable neglect that its petition seeking relief from the final state court judgment rested on the audacious claim that a "fraud" had been perpetrated by *counsel* for Grace and U.S. Gypsum by their failing to help *the Pru's counsel* to preserve the Pru's New Jersey claims against their clients by filing a timely opt-out from the Pennsylvania class action.

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2. Petition for Allowance of Appeal of The Prudential Insurance Company of America *et al.*, *Prince George Center, Inc. v. United States Gypsum Co.*, No. 0637 E.D. Allocatur Docket 1997, Supreme Court of Pennsylvania, dated December 22, 1997 (hereafter "Allocatur Petition"), at 4, 26; Brief for Appellants The Prudential Insurance Company of America *et al.*, *Prince George Center, Inc. v. United States Gypsum Co.*, 704 A.2d 141 (Pa. Super. 1997), dated April 28, 1997 (hereafter "Brief for Appellants"), at 3. For the convenience of the Court, a copy of each of these appellate briefs by the Pru has been lodged with the Clerk.

All three Pennsylvania courts, however, refused to allow the Pru to "spin" the blame away from itself. The trial court, surveying the undisputed facts, found that the Pru, having opted out of the Settlement Class portion of the action in the same state court in April 1995 through in-house counsel, had no valid explanation "why at least one of the five USPS-delivered notices [concerning settlement of the Trial Class action] failed to get through to corporate house counsel." Petition at 37a. For the trial court, there was only one valid conclusion on this record (Petition at 43a):

> [D]efendants did not "sandbag" Pru. To the extent it operated in the dark, it pulled the curtain down on itself.

The Superior Court expressly affirmed the trial court as to the Pru's inexcusable carelessness. The Superior Court concluded that "Prudential received actual notice of this class action" and did not overcome "the presumption that these [five Trial Class action settlement] notices were, in fact, delivered." Petition at 15a. The Superior Court found (Petition at 9a) (emphasis added):

> Prudential was aware of the existence of this action and the proper method for extricating itself from it. Indeed, it utilized the form provided with the notice of the first proposed settlement to decline participation in that settlement. Prudential admits it received professional advice on this aspect of the litigation *and had a letter drafted* [Petition at 61a] *which would have avoided the possibility of it unwittingly being bound to any future judgment in this case.*

Accordingly, the Superior Court had no difficulty sustaining the trial court's discretion to decline "to afford [the Pru] relief from its own failure to avoid a judgment entered against it." Petition at 10a. In a pointed conclusion that spoke volumes about the paucity of the Pru's appellate arguments, including its assertion that its predicament was the result of constitutionally defective notice, the Superior Court specifically *sustained* the trial court's conclusion that "[t]o the extent [Prudential] operated in the dark, it pulled the curtain down on itself. . . ." Petition at 12a.[3]

In sum, the unique facts underlying this petition are: since 1987 the Pru was prosecuting its own assertedly valuable asbestos-property-damage claims in New Jersey. In April 1995 the Pru received notice from the trial court of the settlement of the Settlement Class action and an opportunity to opt out of that settlement. The Pru's in-house counsel, Mr. Lauer, filed a timely opt-out request as to the Settlement Class. Petition at 59a. By that same April 1995 notice, *the Pru was also put on actual notice by the trial court of the fact that several of its New Jersey claims were also claims included in the Pennsylvania Trial Class action.*[4]

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3. The Pru's effort to avoid or reverse these devastating findings against it by both the trial court and the Superior Court was rebuffed in the Supreme Court of Pennsylvania, which denied the Pru's Allocatur Petition.

4. The 1995 notice of the settlement of the Settlement Class action (*see* Petition at 4a-5a), to which the Pru responded with an opt-out request on April 28, 1995 (Petition at 59a), also described the *Trial Class* action in detail at Part 1. of the notice, captioned "Description of the Litigation." The identities of Grace and U.S. Gypsum, among the four defendants in the Trial Class, are made clear, as is the fact that the Trial Class embraced buildings, such

(Cont'd)

The Pru, through in-house and outside counsel, has averred its intent to opt out of the Trial Class by drafting and sending a letter on or about May 10, 1995, to the trial court's prothonotary. Petition at 61a.[5] By its own admitted mistake, however, that opt-out letter was never sent. In 1996, the Pru received actual notice from the trial court that it must opt out of the Trial Class. Again by mistake, responsible persons at the Pru did not forward that opt-out notice to the Pru's in-house counsel.

The Pru (through its in-house counsel) admits that between May 1995 and September 13, 1996, it "regarded the action as a closed issue for Prudential, gave it no further thought . . . ," and "did not monitor the action." [6] The Pru failed to take even the most elementary of follow-up actions in the wake of its intended opt-out letter of May 1995, which was designed to be delivered "**VIA CERTIFIED MAIL**

(Cont'd)
as several of the Pru's buildings at issue in the New Jersey action, that had been leased within the stated time period to the federal government and contained asbestos products sold or manufactured by the Trial Class defendants, the same defendants that are in the New Jersey action.

5. The trial court, noting the Pru's assertion that the May 1995 letter was drafted for the purpose of opting out of the Trial Class, observed that there was an alternative inference, namely, that the Pru "was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Petition at 26a; 52a.

6. Affidavit of Steven A. Lauer in Support of Petition for Declaratory Relief, dated September 30, 1996, at 5; Volume III of Reproduced Record, *Prince George Center, Inc. v. United States Gypsum Co.*, 704 A.2d 141 (Pa. Super. 1997), at 1145a; Supplemental Affidavit of Steven A. Lauer in Support of Petition for Declaratory Relief, dated October 28, 1996, at 2; *id.* at 1161a.

R.R.R." both to the court prothonotary and to class counsel. Petition at 61a-62a. The Pru's counsel evidently did not bother to check its mail thereafter for the two U.S. Postal Service *return receipts* that proper mailing and delivery of the May 1995 letter would have generated. Had the Pru done so, it would have realized – in plenty of time to cure its mistake – that its opt-out letter had never been sent.

This tragic comedy of errors by the Pru, we submit, alone renders this petition devoid of merit. Because of it, this Court could never properly reach the Due Process Clause questions set forth in the Questions Presented. The findings by two lower courts, now unassailable, are that the Pru *twice* received actual formal notice that the Trial Class action subsumed what the Pru believed were valuable choses in action it was pursuing in another court. By failing to send the May 1995 letter opting out of the Trial Class, the Pru bungled one effort to protect those New Jersey claims. The Pru could have cured its first, 1995 mistake by acting diligently with respect to the opt-out notice it received in 1996, but it fumbled the ball a second time.

Thus, absent its palpable negligence in protecting the New Jersey claims, the Pru, by its own words and deeds, would have timely opted out of the Trial Class. In that event, obviously, there would never have been an occasion, nor would the Pru have had the standing, for it to challenge under the Due Process Clause the adequacy of notice of the Trial Class settlement or of Trial Class counsels' representation. That the Pru received actual notice thus renders moot its claim that the notice was constitutionally defective.[7] The Pru's claims in New Jersey were

7. The petition incorrectly suggests that the notice procedure employed by the trial court was without rationale. The facts of (Cont'd)

compromised and extinguished not by reason of any failure of the formal notices to reach the Pru, but by Pru's failure to act on the formal notices it received. Likewise, that the Pru admittedly intended to opt out of the Trial Class and pursue its claims in New Jersey – and would have done so, but for its gross negligence – certainly renders its claim of inadequacy of class counsel with respect to those claims, if not technically moot, manifestly unsuitable as a vehicle for this Court to examine the contours of the Due Process Clause in that regard. It is more than a little ironic that the Pru, having arrived at this stage with its choses in action

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(Cont'd)
record show the opposite. Seven notices of the Trial Class settlement were mailed to the Pru at the Pru's own buildings in May 1996, of which five were delivered. *See* Petition at 15a; 28a. Each of these Pru-owned buildings was on the Trial Class mailing list as a building that was leased in whole or in part to the federal government. Petition at 25a-28a. The Pru has admitted that the five buildings it owned to which notice was delivered were "Prudential offices." Brief for Appellants at 19. These Prudential offices, all of which were in buildings that might have contained or contain asbestos according to the class definition, had a direct nexus to the Trial Class action, since each was in a building identified by responsible federal agencies as having been leased during the class period by the Pru in whole or in part to the federal government. Petition at 23a-26a. The federal agencies, in turn, compiled the list of buildings used in the mailings, for class counsel and ultimately the trial court, from the names and addresses of their private landlords, like the Pru, which doubtless *supplied their respective addresses to the government as the best means of contacting the landlord on matters relating to the building under lease. See* Petition at 26a. The Pru's argument that class counsel did not employ the best practicable means is belied by the fact that the Pru, as landlord, contracted for the very means of notice that class counsel deployed, and deployed successfully insofar as these buildings of the Pru are concerned.

extinguished as a result of its counsel's inadequate representation, now seeks to turn this Court's attention to the adequacy of its representation as to those claims by *class counsel*.[8]

Accordingly, the facts of record unmask this petition as nothing more than the Pru's ill-conceived effort to obtain ordinary appellate relief from this Court "from its own failure to avoid a judgment entered against it." Petition at 10a. That relief was denied in the Pennsylvania courts, *inter alia*, because of the Pru's inexcusably careless inattention both to the trial court's formal notices and to the state's appellate practice-grounds fully independent of the Due Process Clause issues sought to be raised here. On these unique facts, neither of the Questions Presented is properly or effectively before this Court.

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8. In addition, the record fails to support the Pru's repeated assertions below and in its petition that it is an "absent class member" with respect to the Trial Class. To the contrary, the trial court found that "[i]f the need arose to develop a record it is more likely than not that the Pru would also be subject to this Court's jurisdiction on the ground of doing business in Pennsylvania." Petition at 30a. Since the Due Process Clause protections this Court has fashioned in the class action context, *see, e.g., Phillips Petroleum v. Shutts*, 472 U.S. 797, 810-813 (1985), address the perceived procedural needs of plaintiff class members who are not otherwise subject to the class action court's jurisdiction, *id.* at 812, the Pru's status in this regard would be a threshold issue in any examination by this Court of the Questions Presented. We submit that the trial court's observation casts an additional dark shadow over the suitability of this petition. Since it is the Pru who surely bears the burden of proving it is an "absent class member," it must also bear the negative consequence of a record on *certiorari* that suggests otherwise.

II. SINCE THE PETITION RESTS ON CONCEDEDLY "UNIQUE" FACTS THAT "WILL NEVER BE REPEATED" AND CONCERNS ONLY A SINGLE CLASS MEMBER'S EFFORTS TO TAKE ITSELF OUT OF THE CLASS ACTION JUDGMENT, THE PETITION IS A WHOLLY INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE CONSTITUTIONAL ISSUES PURPORTEDLY PRESENTED.

The Pru's petition neither implicates nor seeks to vindicate the Due Process rights of any of the absent Trial Class members. In the nationwide class actions this Court has recently reviewed, *e.g.*, *Shutts* and *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the rights of all absent class members were at issue in the respective grants of those petitions and in the Court's final decisions. By contrast, the Pru's petition seeks only to have this Court referee its private, parochial dispute with the four Trial Class defendants, in which, assertedly, only *the Pru's property interest*-not that of any other class member-was damaged by alleged unconstitutional state court process.

The improvidence of granting this petition merely to resolve this private dispute is illustrated by the fact that the only relief the Pru has consistently sought below is to be *itself* relieved of the underlying August 1996 final judgment approving the trial class settlement, while letting that judgment stand as to all other class members. As a result, the only relief that this Court could direct, on the assumption *arguendo* this Court granted the Petition and reversed the judgment below,[9] is to relieve the Pru of the binding effect

9. Notably terse as to the precise relief this Court should render, in the event the Pru succeeds, the petition (at 30) nonetheless (Cont'd)

of the August 1996 judgment compromising and extinguishing its New Jersey federal court claims.

The record is clear that the Pru has steadfastly avoided attacking the August 1996 judgment *vel non* on behalf of or for the benefit of all class members. That judgment approved the settlement, *without a single objection*, compromising and extinguishing all class claims, including the Pru's claims against the Trial Class defendants. The Pru failed to appeal that judgment within the applicable 30-day period, which thus became binding for *res judicata* and Full Faith and Credit purposes. The Pru's state court petitions, and the state appellate proceedings that followed, have all turned exclusively on the question whether the Pru, alone among all class members, is entitled to relief from that judgment, in the form of a decree that it is "Not A Class Member" or, alternatively, that the Pru's untimely September 20, 1996, opt-out request should nonetheless be deemed timely. With a single exception, not once in these state court proceedings did the Pru ever argue that the August 1996 judgment must be vacated in its entirety as to the settlement and compromise of the claims of *all class members*.

(Cont'd)
states plainly that the Court should "reverse the judgment below," *i.e.*, the judgment of the Superior Court affirming the trial court's November 27, 1996, denial of the Pru's petition and supplement thereto. Petition at 20a, 67a. The record is clear that the relief the Pru sought in the trial court was expressly limited to its being relieved from the August 1996 final judgment. The Pru's lead counsel for its petition in the trial court described the relief sought by his client: "the relief sought by Prudential does not implicate the final judgment [in this case]." Letter from A. Raynes to Special Master Daniel Murphy (11/18/96); Volume IV of Reproduced Record, *Prince George Center v. United States Gypsum Co.*, 704 A.2d 41 (Pa. Super. 1997), at 1748a-1750a.

The sole exception – which in fact comes to nothing for present purposes – occurred on the Pru's appeal to the Pennsylvania Superior Court from the trial court's November 27, 1996, order. In the Pru's Brief for Appellants, the Pru, in the last of its four arguments,[10] sought to attack, not the November 27, 1996, order denying the Pru relief from the August 1996 judgment, but the August 1996 judgment itself. Brief for Appellants at 41-46. The argument heading was: "The Settlement Class Was Improperly Certified And Does Not Meet The Requirements Of The Pennsylvania Class Action Rules." The Pru explained that this fourth argument was the *only* argument it was making on appeal that sought to disturb the underlying final judgment (Brief for Appellants at 41):

> An analysis of this appeal establishes that there are numerous legal grounds for holding that Prudential was not and now should not be considered a class member. None of the preceding grounds for reversal requires disturbance of the class settlement or judgment. This ground does. This point, however, need not be reached if this Court reverses on any of the preceding grounds.

There are five reasons why the instant Petition is not and cannot be transformed into a vehicle for "disturbance of the class action settlement or judgment." First, the Pru not only failed to raise any attack in the trial court on the

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10. Arguments I, II, and III argued that the Pru alone should not be bound by the August 1996 judgment compromising and extinguishing the claims of the trial class. *See* Brief for Appellants at i.

judgment, it specifically disavowed any such relief.[11] Thus, no such attack on the August 1996 judgment (which itself was not appealed) was properly before the Superior Court on appeal from the lower court's November 27, 1996, post-judgment order. *See* Petition at 7a-8a (Superior Court "will only consider those issues properly raised in Prudential's petition filed September 30, 1996, and disposed of by the trial court's order of November 27, 1996 . . . ."). Second, the Pru's effort to raise this attack in the Superior Court was not repeated in its Petition for Allocatur before the Pennsylvania Supreme Court.[12] Thus, the Pru could not conceivably be held to have preserved any issue of a class-wide defect in the August 1996 judgment for review by this Court on *certiorari*.

Third, not a single word in the Pru's Questions Presented or its *certiorari* petition even implies that the August 1996 judgment is invalid as to the class as a whole. Fourth, any effort by the Pru to call into question in this Court the August 1996 judgment would have been invalid in any case: its fourth argument to the Superior Court *did not invoke federal constitutional grounds for vacating the entire August 1996 judgment*. Rather, the asserted bases advanced by the Pru for doing so were grounded solely in Pennsylvania law. *See* Brief for Appellants at 41-46. Fifth, the relief the Pru seeks here is limited to a reversal of the Superior Court's judgment, which judgment reaches only the validity of the trial court's November 27, 1996, order denying post-judgment opt-out relief to the Pru. Petition at 30.

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11. *See* n.9 *supra*.

12. *See* Allocatur Petition at 3 (Questions Presented for Review).

In light of the foregoing, the parameters of the real dispute presented by this post-judgment state court proceeding are confined to state law issues and are indisputably both narrow and fact-specific: as the Pru has admitted, "these facts will never be repeated." The consequences of the August 1996 judgment are at issue only insofar as they involve a *single class member's* efforts to cure "its own failure to avoid" that judgment. Petition at 10a. This case, therefore, hardly presents an appropriate vehicle (assuming one is needed now or ever) for this Court to consider whether "the enormous growth of nation-wide class actions in state courts makes it vital to define the constitutional protections against unfair or collusive settlements" (Petition at 9, first "reason for granting the writ") – of which there is no evidence whatsoever.

CONCLUSION

The Pru's assertedly valuable choses in action were not extinguished by any alleged violation of the Due Process Clause in the Pennsylvania state courts. Despite the Pru's failure of proof on the pivotal issue whether *it is* an absent class member, the Pru nonetheless received the full measure of the constitutional protections of adequate notice and adequate representation that are due an absent class member.[13]

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13. The joint opposition filed by co-respondents demonstrates beyond peradventure that the Pru failed properly to raise and preserve the issue, for this Court's review, of constitutional adequacy of representation of an absent class member. Respondents need not retrace that discussion here, but instead incorporate it by reference. We submit only that, in any event, the trial court, out of an abundance of caution, proceeded to answer every purported contention of the Pru that was even mentioned in its memorandum accompanying its petition for reconsideration, despite clear Pennsylvania law that such mention is insufficient to raise or preserve an issue. Petition at 51a-58a. Addressing this adequacy issue, the trial court found that building-owner asbestos plaintiffs like the Pru "are encountering greater difficulty establishing liability and damages," among other "difficulty-of-proof factors" putting the plaintiff class at "great risk," as recognized by the Eastern District of Pennsylvania (Judge Giles) in its approval of the 1995 class settlement in *In re Asbestos School Litigation*, 789 F.2d 996 (3rd Cir. 1986). Petition at 51a-52a. The trial court thus found that even if the Pru's New Jersey claims had been given specific consideration by class counsel and the trial court, "it would not have caused us to reject the settlements on the ground of inadequacy." Petition at 52a. Moreover, the Pru has pointedly ignored the fact that the Trial Class settlement was reached after nearly 10 years of hard-fought litigation by experienced class counsel – aware of both the outcomes of litigated asbestos-in-building cases and the great risks of trial; and after protracted arms-

(Cont'd)

In truth, the record here is redolent with gross corporate carelessness and inadequate representation by professional employees and agents of the Pru. This Court's writ cannot be used to rescue the Pru "from its own failure to avoid a judgment entered against it." The petition must be denied.

Respectfully submitted,

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(Cont'd)
length settlement negotiations and numerous settlement conferences presided over by the trial court, which approved the settlement, *without objection*, based upon all relevant factors under Pennsylvania law (which mirrors federal class action settlement law). The Pru also ignores the trial court's observation that in May 1995 the "Pru was contemplating the possibility it would be better off as a member of the trial class than as an individual litigant." Petition at 52a.

Supreme Court, U.S.
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No. 98-1695

In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners,*

v.

PRINCE GEORGE CENTER, INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

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STATEMENT PURSUANT TO RULE 29.6

This information is contained in Prudential's Petition for a Writ of Certiorari at p. ii.

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REPLY BRIEF FOR PETITIONERS

Respondents do not contest the factual foundation for our constitutional challenges to the adequacy of representation and notice.[1/] They do not dispute that class counsel failed to make any inquiry into the existence or value of the claims being pursued by class members before consenting to extinguish them. They also do not deny that no effort was made to send notice to the addresses at which the notice was most likely "actually to inform the absentee" class members (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)) of the threatened disposition of their claims. Nor do respondents deny that the constitutional issues are broadly important.

Instead, they argue that (1) evaluation of the notice procedures would entail review of a factual finding by the Pennsylvania courts that Prudential received "actual" notice at corporate outposts; (2) the Pennsylvania courts' failure to reach the adequacy-of-representation issue insulates it from review; and (3) Prudential's failure "to protect itself" from class counsel's inadequate representation and notice by monitoring the case poses some sort of equitable bar to review. None of these assertions has merit or undermines the reasons for granting certiorari.

1. The Issues Raised Are Important And Recurring. The constitutional issues presented here are of great moment. In the last few years, Congress, lower federal courts and this Court have focused on the procedural vagaries and abuses in state-court class actions. Congress perceives the current state of affairs as so unguided and unfair that it is actively considering *federalizing* all major state-court class actions by eliminating the complete-diversity requirement for removal to federal court. See 67 U.S.L.W. 2723 (June 8, 1999). The abuses framed by this case are emblematic. Although the company respondents assert that it would impinge on "principles of federalism" (Opp. 28) for this Court to clarify the governing constitutional standards, the failure to respond to the problems may force congressional intervention with an even more profound impact on the relative roles of federal and state courts.

[1/] Respondents U.S. Gypsum Co. *et al.* are the "company respondents" (their Brief in Opposition is "Opp."); respondents class plaintiffs are "class counsel" (their Brief in Opposition is "Counsel Opp.").

Respondents make virtually no effort to deny the recurring nature of the questions presented in Prudential's petition. Instead, they argue that this case is not the appropriate vehicle to resolve these issues, repeatedly quoting Prudential's earlier characterization of aspects of the case as "unique." Opp. 2; Counsel Opp. 3.[2/] While certain aspects of this case are indeed extreme — "unique" — these facts frame constitutional *issues* that are generic and endemic. Broadly, the notice issue examines what efforts must be undertaken to ensure that addresses on a class notice list are the addresses "most likely" to inform the addressees of the pendency of the action. As manifested in the facts here, this issue implicates two huge categories of class members: (1) corporations with easily locatable headquarters; and (2) class members who have already provided the trial court and class representatives with their actual, relevant "best address" at some earlier stage in that very proceeding. The duty of class counsel to make reasonable inquiry about the value of class members' claims before extinguishing them in a global settlement is of similarly wide import. It is implicated in almost every case (such as mass tort actions) involving a large number of potential claimants.[3/]

The company respondents point to the recent withdrawal of the opinion in *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), which held that due process invalidates a state-court settlement where class counsel failed to do an adequate job of evaluating class members' claims. This development, they say, eliminates the conflict described in the petition (Pet. 16). What they fail to note, however, is that the panel's decision to withdraw its earlier opinion rested solely upon the view that the original forum court had already sustained the adequacy

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[2/] The company respondents endeavor to characterize the facts of this case as unusual by distinguishing several of the notice cases we cited. Opp. 17-18. But that recitation merely shows that the Court's most important articulations of the due process requirements concerning individual notice have come in cases whose facts are, if anything, far more "unique" than those of this case. See *ibid.*

[3/] Class counsel contend (at 10-14) that, because Prudential only sought relief for itself in the trial court, this somehow suggests that the issues are not of general importance. Of course, anyone similarly situated — in this case and others — would be able to invoke the constitutional principles we urge the Court to define.

of representation and the issue was not (for divergent reasons) subject to *collateral* attack in a *different* forum. See 1999 WL 359511 (June 7, 1999). (Prudential, by contrast, is here pursuing a direct attack presented in the original forum.)

Neither judge in the *Epstein* majority purported to disavow the panel's earlier substantive holding that Delaware class counsel's failure to investigate the existence or pendency of class members' federal claims denied due process. Indeed, Judge Wiggins's concurrence indicated that he continued to endorse the original analysis of inadequacy, as Judge Thomas did explicitly in his dissent. See 1999 WL 359511, at *10 (Wiggins, J., concurring) ("I remain troubled by the substance of the Delaware settlement."); *id.* at *13 (Thomas, J., dissenting) (the "representation provided by Delaware class counsel was inadequate" because they "did not investigate or properly evaluate the federal claims"). As the D.C. Circuit once said in an identical situation, where another circuit's panel opinion had been withdrawn on jurisdictional grounds, "[i]f the song of [*Epstein*] has ended, the melody may linger on in * * * rulings and attitudes, guided by its wisdom though no longer channeled by its mandate." *Smith* v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965). Thus, the issue remains: Was the Ninth Circuit or the Pennsylvania court right about the standards required of class counsel under the due process clause?

2. The Notice Issue Is Properly Presented. Respondents' arguments in opposition to a grant of certiorari on the notice question are insubstantial. In our petition, we pointed out that neither class counsel nor the court made *any* effort to (1) update the notice list with the recent address information provided by the class members most likely to opt out of settlement (those who had opted out last time); (2) identify the "best address" (the corporate headquarters) of the many corporations in the class; or (3) verify the accuracy of the addresses of class members whose notices were returned as "undeliverable." Pet. 4-7, 25-29. We explained why that notice process was not designed in a manner "such as one desirous of actually informing the absentee [class member] might reasonably adopt" (*Mullane*, 339 U.S. at 315). We also explained why this Court should establish that due process requires constructing a notice process that addresses these recurring scenarios in a more careful way.

Respondents do not even attempt to argue that the notice process used in this case was the "best notice practicable" for the many class

members in Prudential's position. Instead, they attempt to side-step that constitutional question by arguing that review is improper since the Pennsylvania courts have "found as a factual matter that Prudential received actual notice" (Opp. 13). Thus, they aver, review would demand reconsideration of that factual finding by the state courts. This is a red herring. Prudential is not asking the Court to overturn any findings of fact or to make any new findings.

The state court's "actual" notice finding was simply that notices were "*delivered* to five separate Prudential properties" (Pet. App. 11a) (emphasis added). This inference rested on a state law "presumption" of *delivery*, because "the Post Office returned [only] two" of seven notices addressed to Prudential buildings. Pet. App. 28a, 11a, 15a. (During the years in question, Prudential owned approximately 1,000 buildings around the country.) There is no evidence, however, and thus no finding that anyone *employed by Prudential at those buildings* ever received the notices. Most crucially, it is undisputed that the process did not lead to anyone at Prudential's headquarters, including its counsel, learning of or receiving any of the mailed notices before the time to opt out or challenge the settlement had expired.

The goal of constitutionally adequate notice, however, is to ensure that the addressee is likely *to receive* the information in a way that will alert him to the proposed disposition of his property rights. *Mullane*, 339 U.S. at 315. Thus, the Court has emphasized that the "best practical notice" is notice that one "desirous of actually informing the absentee" would select. *Ibid.* Respondents do not question the well-settled notion (see Pet. 27) that one who actually desires to inform a corporation of the possible disposition of its legal claims, in a manner that would allow it time and opportunity to make an informed decision about how to proceed (see *Mullane*, 339 U.S. at 314-315), would direct notice to its headquarters. Nor do they debate the common-sense proposition that the best notice to any class member, individual or corporate, is notice to the address that class member has most recently provided to the court in that proceeding. (Thus, when the company respondents wanted Prudential actually to receive their "gotcha" notice the day after the time to challenge the settlement had expired, they sent it to Prudential's counsel.)

The constitutional question squarely presented here is whether due process requires class counsel and the court to use the easily accessible "best address" of corporate class members' headquarters,

especially where the class member has actually furnished that address in that very proceeding, rather than the address of some outlying corporate property. Whether or not the notice is "delivered" to some corporate employee, such as a janitor, at one of the outlying properties to which notice was directed does not affect the outcome of that question one way or the other. Put differently, if notice to those remote Prudential properties was not the "best notice practicable" to Prudential, because class counsel and the trial court "ha[d] on [their] books" (*Mullane*, 339 U.S. at 318) a more reliable address, then it makes no constitutional difference that the notices may have been "delivered" to *someone* at those properties.

Thus, references to Prudential's having received "actual" notice are a fiction sharply at odds with the controlling constitutional standard. It is mere question-begging to assert that Prudential had received "actual notice" and simply "failed" to act on it.

Ironically, respondents' only effort to justify as constitutional their decision not to bother using the easily accessible addresses Prudential (and other class members) had provided is to invoke the "flexibility" of the "best practicable notice" standard. Opp. 17. But this precisely frames our point. Flexibility is surely important in many situations. But when there are categories of class members for whom it is possible to define more concretely what the "best practicable notice" means—as this case illustrates—the Court should provide that guidance and close off a common opportunity for abuse.

Respondents further contend that, even if Prudential did not receive constitutionally sufficient notice of the settlement, the Court should deny certiorari because Prudential had a "duty to protect itself" by monitoring the action it knew was pending. Counsel Opp. 2. But as we explained in our petition, this argument — upon which each of the decisions below was premised — is irreconcilable with this Court's clear dictate. "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 810 (1985). Similarly, Prudential's commercial sophistication and "ability to take steps" through legal advisors or otherwise "to safeguard its interests" (*Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 799 (1983)) "does not relieve" the

trial court of its "constitutional obligation" to provide sufficient notice. *Ibid.*

Class counsel trumpets Prudential's failure to send a contemplated letter trying to opt out of the entire case, suggesting this is some sort of equitable reason to deny review. Counsel Opp. 6-9. They do not establish, though, that the Pennsylvania court would have given effect to such a gratuitous letter. In any event, Prudential had "a right to assume that * * * 'reasonable notice'" of any new settlement would be given "before [its] claims are forever barred." *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953).[4/]

3. The Adequacy-of-Class-Counsel Issue Is Properly Presented. ***A. Merits.*** Respondents raise no serious defenses to our challenge to the adequacy of the representation provided by class counsel. Although class counsel sharply criticize their "client," Prudential, for its purportedly "inexcusable" failure to protect its own interests, they *do not dispute* that they are guilty of an even more "gross misfeasance" (Counsel Opp. 3) — failing to protect the interests of not only Prudential, but any of their clients. Class counsel *do not dispute* that (1) they made *no attempt* to learn about the existence or determine the value of the claims that *any* class members were pursuing in other forums, before agreeing to extinguish those claims; (2) they never submitted an interrogatory to defendants inquiring about the existence of such pending claims; and (3) they lacked any knowledge of Prudential's lawsuit or the value of its asserted claim ($110 million) when they agreed to sell it for a pittance.[5/]

Indeed, none of the respondents even disputes that constitutionally adequate representation demands *some* meaningful investigation of

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[4/] To the extent class counsel suggest that Prudential's failure to send the letter somehow excuses their own failure to provide adequate representation, they are seriously misguided. It is common ground that counsel who purport to bind a client to a settlement may not excuse their failure to represent the client adequately by pointing out that the client had another attorney.

[5/] Ironically, the company respondents take issue with our calculation that the average claim was settled for $125, stressing (Opp. 8 n.8) that "settlements of this nature yield extremely low claim rates," so any class member who actually comes forward may get more!

the value of class members' claims before settling them. Instead of trying to justify the constitutional adequacy of class counsel's approach, respondents simply (1) point to the "experience" of class counsel and the frequency with which they engage in this sort of behavior (Opp. 3 & n.3, 24), and (2) argue that even the most minimal inquiry would have been excessively burdensome, given the sheer number of class members — "36,000+." (Opp. 23).

But both of these proffered "justifications" for class counsel's approach merely confirm the urgent need for this Court to grant review. If the "representation" afforded Prudential and other absent class members was, as respondents contend, the very best that class members can expect from the "leading" class action lawyers "in the nation" (Opp. 24), the problem is even more serious than we have contended. A class counsel's experience litigating similar types of claims is no substitute for learning the salient facts concerning major claims of identifiable "clients." In the context of individual representation, a similar reliance on familiarity with a kind of claim (*e.g.*, personal injuries) as a substitute for factual investigation of the value of the specific claim of one's clients (*i.e.*, the scope of the harm) would be fair ground for a malpractice suit. Respondents proffer no reason why such neglect of clients' interests is any more acceptable when the clients are involuntary members of a class.

When respondents suggest that the overwhelming size of a class excuses a failure to investigate, they confirm why review by this Court is imperative. In *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court rejected exactly such a "the class is too big" excuse for curtailing the notice protections to which Rule 23 of the Federal Rules of Civil Procedure entitles absent class members. *Id.* at 175-176. The Court admonished: "There is nothing in Rule 23 to suggest" that its protections "can be tailored to fit the pocketbooks of particular plaintiffs" when they have chosen to represent a class of overwhelming size. *Id.* at 176. See also *Shutts*, 472 U.S. at 821 ("the fact that it may be more difficult or more burdensome to comply with constitutional limitations because of the large number" of class members does not excuse relaxation of those limitations). Similarly, class counsel's inability to provide adequately informed representation to a large class may require counsel to scale back their fee-driven desire to aggregate larger classes than they can fairly

represent. The size of the class they try to assemble cannot justify relaxing the applicable due process protections.

In a further effort to show the "infeasibility" of Prudential's due process test for the adequacy of class counsel, respondents mischaracterize our argument as demanding that counsel evaluate "the possible individual claims of each and every absent class member before negotiating a settlement." Opp. 22. Our point, rather, is that counsel made no reasonable or systematic inquiry into the value of the claims of the class *as a whole*, including those claims actually being pressed in other, identifiable pending lawsuits. Since class counsel here concededly made *no* inquiry into the claims of *any* of the class members, the question presented is whether *any* inquiry is required at all. The answer should be obvious. In any event, respondents do not dispute our point that class counsel could easily have garnered essential information regarding the claims *being actively pursued* by class members merely by serving a *single interrogatory* requesting that information. Pet. 19. The "burden" of that inquiry can hardly be characterized as exceeding the "reasonably diligent efforts" the Court has required in analogous contexts. *Mennonite Bd. of Missions*, 462 U.S. at 798 n.4.

Respondents also assert that the question is not amenable to review because Prudential purportedly failed to "present[] * * * evidence below that would support a finding that class counsel actually failed to perform adequately in its representation" of not only Prudential, but "the class as a whole." Opp. 23. But no "factual record" is necessary where, as here, the issue is not in dispute. Class counsel do not contest our assertion that they "did not ask defendants about, *or investigate independently, the existence or value of other pending lawsuits* that the settlement would extinguish." Pet. 5 (emphasis added).

Finally, the company respondents argue (at Opp. 4) that there was no need to investigate the value of the building owners' claims, because developing science suggested that they were of little value. But even the statistics they cite reporting their litigating experience (at Opp. 4 n.4) establish that juries have resolved between a third and a half of the cases in favor of building owners, like Prudential and its fellow class members, and against the company respondents. The record in the New Jersey case strongly suggested that Prudential's claims would be among the substantial percentage of suits against

asbestos-makers that succeed. It already had survived several motions to dismiss and was on the verge of trial. Further, as respondents note (Opp. 18), Prudential is a sophisticated company. If its claims were valueless, as respondents self-servingly suggest, it is inconceivable that Prudential would have devoted more than $15 million to pursuing them, as it has done.

Indeed, *both* sides were committing massive resources to the imminent trial. The company respondents continued to pour money into defending against Prudential's claims while they were negotiating to settle the class action. They evidently elected not to seek to stay those costly proceedings lest they tip off Prudential (and the federal court) that they were trying to buy their way out of the case for a song through a cozy settlement in a state-court class action. These tactics suggest an awareness of real exposure. In any event, the important point is not what the value of Prudential's claims was, but that (1) "highly experienced" class counsel deemed it constitutionally unnecessary even to evaluate the claims before settling them, and (2) as respondents indicate, such willful blindness is the norm.

B. Preservation. Respondents contend that the issue was not adequately preserved as "a federal constitutional issue." Opp. 9-11, 19-22. But our Petition at 7-9, 20-21 details the instances in which Prudential raised and preserved this federal constitutional challenge. Prudential challenged the constitutional adequacy of representation at the earliest possible opportunity and made as complete a record as the Pennsylvania courts would allow.

Within days of learning of the class settlement, Prudential petitioned the Pennsylvania court for relief. Its petition expressly noted that, since Prudential "was not a party" to the case, it had just "begun to investigate a rather lengthy record" and reserved the right "to supplement its Petition." Opp. App. 9a n.3. In its initial memorandum supporting the petition, Prudential explicitly invoked this Court's *federal constitutional decision* "in *Shutts*" for the proposition that "either inadequate notice *or inadequate representation* deprive a class action plaintiff of due process." Mem. in Support of Pet. 28 (Ct. Comm. Pleas 9/30/96). It then articulated precisely the theory we urge here: "any class representation which did not at least *take into account*" the value of a lawsuit pending in another forum, prior to settling it, was inadequate. *Ibid.* But because, when Prudential promptly filed its petition, it lacked specific

information about *whether* class counsel *had* taken such lawsuits into account, it could only "reserve its argument concerning the issue of adequate representation" for subsequent briefing. *Ibid.* Prudential then reiterated its constitutional argument, specifically requesting "discovery" into specified facts bearing "on the issue of inadequacy of * * * representation," if the court declined to grant relief on other grounds. Prudential's Br. In Support of Pet. for Recons. & Clarif. 29 & n.10 (Ct. Comm. Pleas 12/10/96). Yet Prudential's request for relief, including its request for discovery, was denied. App. 51a.

Any uncertainty in the record was eliminated when class counsel candidly — and crucially — admitted that they had done nothing to ascertain the existence or value of Prudential's claims. Br. of Appellee-Trial Class Reps. at 1 n.1 (Super. Ct. 5/27/97). Since class counsel conceded that they had made no reasonable inquiry before settling 36,000 building-damage claims for $7.8 million (including their own fees), and since counsel were concededly unaware that one class member was pressing claims for $110 million, Prudential had an adequate — indeed, compelling — record for pressing the Fourteenth Amendment due process objection that it expressly raised in precisely those terms in both courts below.

The company respondents cite three Pennsylvania decisions more than 70 years old to support their argument that no facts not contained in the verified petition itself could be considered. Opp. 21. The modern cases, however, require the trial court to consider all papers, including briefs, in evaluating a petition to reopen. See, *e.g.*, *Liazis* v. *Kosta*, 421 Pa. Super. 502, 507-508, 618 A.2d 450, 453 (1992) (briefs and record in other cases); *West Chester Plaza Assoc.* v. *Chester Eng'rs*, 319 Pa. Super. 196, 201-203, 465 A.2d 1297, 1299-1300 (1983) (supplemental brief). Indeed, the trial judge addressed this issue on the merits (but rejected Prudential's objection) without suggesting it was untimely or improperly framed. Pet. App. 54a-55a.

Thus, there can be little debate that the adequacy-of-class-counsel issue was raised in the Pennsylvania courts with "'fair precision and in due time.'" *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (citation omitted). There is, therefore, no adequate state ground blocking review. Pet. 20-21.

CONCLUSION

The petition for a writ of certiorari should by granted.

Respectfully submitted.

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No. 98-1695

In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners,*

v.

PRINCE GEORGE CENTER INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION

Pursuant to Rule 15.8, petitioner Prudential Insurance Company of America submits this Supplemental Memorandum to address the Court's decision in *Ortiz* v. *Fibreboard Corp.*, ___ U.S. ___ (No. 97-1704) (June 23, 1999), which was announced the day after Prudential filed its Reply Brief in support of its Petition for a Writ of Certiorari. The decision in *Fibreboard* reenforces several of the grounds for granting plenary review in this case.

1. Adequacy of Representation by Counsel. In Fibreboard, the Court noted that in its earlier decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), it had observed that the crucial subject of the "adequacy of representation" in a class action includes not only the "adequacy of named plaintiffs" but also the "[1] competency and [2] conflicts of class counsel." Slip op. at 39 n.31. The Court explained that, in *Amchem*, it had "concentrated" on the adequacy of the named plaintiffs to represent the interest of other class members. *Ibid.* But *Fibreboard* ultimately turned on the adequacy of class counsel, and specifically on the existence of disabling "conflicts" of interest in counsel's obligations to various competing groups of class "clients."

The present case involves the other requirement for adequacy of class counsel noted in *Amchem* and reiterated but not addressed in *Fibreboard* — the "competence" of class counsel in performing the functions they have voluntarily assumed. Prudential has urged the Court to address a vital and pervasive element of "competence" in representing the interests of absent members of virtually any class:

> To what extent does the Due Process Clause require class counsel to conduct at least some systematic investigation into the value of the claims of absent class members,

especially where those claims are already pending in another forum?

Thus, this case frames an important and endemic issue noted but not further explored in both *Amchem* and now *Fibreboard*.

In opposing Prudential's petition, respondents have argued that the Court should defer to the trial court's finding that class counsel were constitutionally adequate because the law firms representing the individual class representatives had "other significant experience in asbestos litigation" (Opp. 3 n.3) and included some of the "leading" asbestos-litigation lawyers "in the nation" (Opp. 24). This argument is remarkably similar to the finding that the district court was persuaded to make in approving the class-wide settlement in *Fibreboard*, where the district court expressly rested its finding that class counsel provided adequate representation on the determination that "Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar . . . ." *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 524 (E.D. Tex. 1995). The similarity in the arguments is not surprising, because some of the counsel involved in *Fibreboard* also served as counsel for the class here.

This Court in *Fibreboard*, however, found this reliance on general "experience" and "skill" no substitute for a searching inquiry into the way class counsel actually performed their functions in purporting to represent the interests of absent class members. In reversing the finding of adequacy of class counsel, this Court expressly ruled that it is not reasonable in a class action to assume that the "settlement amount" the class counsel is willing to take results from adequate representation. The Court explained that in the ordinary, single-client case, the courts may "assume that parties of equal knowledge" agreed upon the figure "through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in

the negotiation." Slip op. at 34. "But," the Court cautioned, "no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees." *Ibid.* The Court then added:

> In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

Id. at n.30.

Here, of course, there was no bargaining with "equal knowledge." On one side of the table were counsel for the company respondents, who were simultaneously defending against Prudential's claims against those same respondents in federal court in New Jersey. They knew that the federal court was the setting for trial of Prudential's claims for over $110 million in damages. (We do not know what they knew about the value of *other* pending claims against those companies.) On the other side of the table, "ostensibly" representing Prudential's interests as an absent class member, were class counsel who not only knew nothing about the existence of Prudential's suit but conceded below that *they had done nothing* to investigate or evaluate the claims of class members like Prudential.[1] In light of its realistic observation in *Fibreboard*, the Court can surmise a possible connection between the willingness to compromise 36,000 claims of unexamined value for an average of $125 while securing support for a $3 million fee for class counsel.

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[1] Indeed, at least in *Fibreboard*, class counsel was sufficiently alert to the interests of class members in the same posture as Prudential here, because that settlement class "did not include claimants with actions presently pending" against the settling defendant. Slip op. at 6-7.

Thus, the cautionary principles so recently articulated in *Fibreboard* show why the Court should grant review here in order to take the next, important step in defining the components of constitutionally adequate representation by class counsel: Can representation be adequate without conducting a meaningful inquiry into the existence and value of pending claims?

2. Adequacy of Notice. In *Fibreboard*, the Court reiterated its holding in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), on which Prudential relies, that "before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation' . . . ." Slip op. at 30. The present case frames important practical questions about defining generic contours to this element of due process. Specifically, to be adequate, must the notice to a large, out-of-state corporation presumptively be directed to its corporate headquarters, and in any event must notice be directed to the address the absent class member already has provided earlier in the litigation?

In answering those questions, another aspect of *Fibreboard* is apt. In analyzing the constraints on settling the financial claims of absent class members, the Court explained that it was guided by concern for the "Seventh Amendment jury trial rights of absent class members" and the risk that denying absent class members an effective opportunity to opt out of a settlement "compromises their Seventh Amendment rights without their consent." Slip op. at 27-28.

That is exactly what happened here as a result of the notice process sustained by the lower courts. Prudential's federal claims against the company respondents were on the eve of a jury trial in the District of New Jersey, a jury trial to which they had a Seventh Amendment right. The palpable defects in the notice process effectively deprived Prudential of any realistic, timely chance to opt out of the Pennsylvania state

court settlement and thus to preserve their Seventh Amendment rights. The Court, therefore, should grant review to establish that readily available notice procedures best calculated to protect Seventh Amendment rights must be used, as they were not in this case.

Respectfully submitted.

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IN THE

Supreme Court of the United States

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

PRINCE GEORGE CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Rule:

Fed. R. Civ. P. 23(b)(1)(B) 2

RESPONDENTS CLASS PLAINTIFFS' SUPPLEMENTAL BRIEF

Petitioner Prudential Insurance Company of America has submitted a Supplemental Memorandum purporting to "call[] attention to [a] new case" under Rule 15.8. The "new matter" that Prudential alleges is this Court's decision in *Ortiz v. Fibreboard Corp.*, __ U.S. __ (No. 97-1704) (June 23, 1999). Prudential asserts that the "decision in *Fibreboard* reenforces several of the grounds for granting plenary review in this case." Supp. Memo. at 1.

But except for the fact that *Fibreboard* is a class action case, *Fibreboard* has nothing whatsoever to do with either the underlying facts or law or the purported Questions Presented here. *Fibreboard* therefore does nothing to cure the fatal deficiencies of Prudential's ill-conceived Petition. Unmasked, Prudential's Supplemental Memorandum is an abuse of Rule 15.8 and an impermissible vehicle to reargue old matters already presented in Prudential's Petition and Reply.

Respondents Class Plaintiffs tender this Supplemental Brief pursuant to Rule 15.8 to answer and correct Prudential's improper and misleading Supplemental Memorandum. The sharp contrasts between *Fibreboard* and this case show that Prudential's claim of "new matter" in *Fibreboard* that "reenforces" its Petition is frivolous.

First: *Fibreboard* involved a mandatory settlement class action under the Federal Rules of Civil Procedure filed solely for the purpose of implementing a global deal between a class of asbestos personal injury victims and a corporate defendant and its insurers. The instant state-court action, however, was a decade-long litigation war begun in 1986 between a class of commercial building-owner plaintiffs and 28 solvent defendant manufacturers of asbestos-containing building products.

Respondents United States Gypsum Company and W.R. Grace & Co.-Conn. and two other defendants refused to join the 24 others in the first group of settlements approved in 1995. These remaining defendants continued to fight and prepare for trial. As trial approached, they finally decided to settle with the class. By contrast to *Fibreboard*, adversity was the signature of this case.

Second: *Fibreboard* involved an alleged "limited fund" class action certified under Rule 23(b)(1)(B), Fed. R. Civ. P. The asbestos manufacturer and its insurers claimed there were insufficient funds in the form of assets and coverage to defend all asbestos personal injury claims and satisfy the successful ones. Class counsel never disputed this claim. Instead, the settling parties all argued the presence of "an early feast . . . later famine" risk that Rule 23(b)(1)(B) could properly be used to resolve. *See* slip op. at 20. Objectors, however, presented a veritable steeplechase of constitutional and statutory hurdles to the use of a federal procedural rule to shoehorn thousands of present and future personal injury choses in action held by absent class members into a single-shot *in rem* proceeding on the "equity" side of a federal court. In addition to the intra-class conflicts thus created, objectors also pointed to the sharp conflict engendered by Fibreboard's resolution of 45,000 "inventory" cases outside the class on substantially better terms–and contingent as well upon either an approved global settlement or success in the coverage dispute–as an apparent *quid pro quo* for class counsel's signing on to the class action settlement.

By contrast, there is here no such unprecedented, conflict-ridden use of federal Rule 23(b)(1)(B) to settle mass tort personal injury damage claims.[1] This is an opt-out class action under the

1. This Court observed in *Fibreboard*:

> Although . . . the revised text [of Rule 23] adopted in 1966 was understood (somewhat cautiously) to authorize the

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Pennsylvania Rules of Civil Procedure that was certified for trial, as were several similar asbestos property-damage class actions in other courts. On the eve of trial, litigation adversaries negotiated a compromise without any pressure or threat that a successful judgment against the Trial Class defendants would result in their insolvency. There were no intra-class conflicts, nor any suspiciously more favorable "sidebar" deals for non-class claimants. As a result, *not a single objection to the Trial Class settlement was raised at the fairness hearing by Prudential or any other of the thousands of class members/owners.*

Third: *Fibreboard* involved a mandatory, non-opt out class. Absent class members had no right to receive notice and to exclude themselves from class membership. Slip op. at 15 n.13. Under that compulsion, their choses in action would be extinguished and subjected to an equitable "haircut." As a result, this Court demanded close adherence to the historical characteristics of the "limited fund" class action device as presumptively necessary protections for the locked-in class. *See* Slip op. at 23, 30-44.

By contrast, Prudential's and all other class members' constitutional rights and choices were fully preserved here. Two successive classwide notices were mailed to the addresses shown by the property owners, like Prudential, on their respective leases with the federal government.[2] Class members were given a

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> courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt-out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see *supra*, at 24-25.

Slip op. at 44.

2. Prudential continues to insist that this case "frames important practical questions about defining generic contours" of due process

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choice to opt out to the tort system or remain in the classes. They were clearly advised of the consequences if they did not opt out in time: their choses in action, even if pending, would be compromised and extinguished by the settlement.[3] By contrast to the coercive limited fund treatment of class members in *Fibreboard*, notice and freedom of choice for the class were the hallmarks of this case.

Fourth: In *Fibreboard*, this Court's holding was directed at two issues. First, could the "limited" nature of the fund be

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notice to the class, and to complain of "palpable defects in the notice process." Supp. Memo. at 4. But Prudential's notice argument founders on its own premise that constitutionally adequate notice is notice "such as one desirous of actually informing the absentee [class member] might reasonably adopt." Reply Brief at 3, *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Prudential has not and cannot rationally explain why *Mullane* is not satisfied here by class counsel's reliance on the notice provision and address that *Prudential itself* bargained for in its property leases with the federal government, the use of which to deliver the class notice provided *five actual notices of the Trial Class settlement* to Prudential at its respective properties' addresses.

3. Prudential repeats the falsehood that "36,000 claims" were settled "for an average of $125 . . . ." Supp. Memo. at 3. *See also* Petition at *i*; Reply at 6 n.5. Had Prudential bothered to cite the facts, it would have disclosed that roughly 80% of the some 36,000 buildings are small, rural post offices, and that the claims verification and distribution procedures have not yet taken place. Although the thousands of owners of the 36,000 federally-leased buildings were notified, the hallmark of the *class* is an owner's federally-leased building in which "asbestos or asbestos-containing materials *were present*." Petition at 4a (emphasis added). Thus, eligibility for a claim against the settlement fund will require proof of both the presence of asbestos within the ten-year class period and the claimant's asbestos abatement expenditures. It is likely that only a fraction of the 36,000 buildings actually contained asbestos, of which an even smaller number will have been proven to have had that asbestos abated at the claimant owner's cost.

determined solely by the parties' settlement agreement? Second, was the fund allocated to the class claimants "by a process addressing any conflicting interests of class members"? Slip op. at 1. Reversing, this Court answered both questions in the negative; and in *dicta* it seriously questioned the fairness of a limited fund settlement with a corporate defendant that "was allowed to retain virtually its entire net worth." Slip op. at 42. By contrast, neither of the two purported Questions Presented by the instant Petition is even remotely related to the *Fibreboard* holdings.

The foregoing contrasts between *Fibreboard* and this case do more than demonstrate the absence of "new matter" in *Fibreboard* in relation to this case. In fact, they serve to highlight the fatal weaknesses of Prudential's Petition:

Prudential, entitled to the best practicable notice, received more. Prudential received actual notice at the very addresses specified for notice in its building leases.

Prudential, entitled to opt out by timely written exclusion, apparently decided it would opt out and then (either intentionally or unintentionally) did not submit a timely exclusion.

Prudential, entitled (if it chose to remain in the class) to contest the Trial Class settlement on any appropriate ground, including a claim of inadequate representation by counsel, elected not to appear at the fairness hearing. Instead, alleging an inadvertent, excusable failure to opt out, Prudential sought permission to do so late in a petition for post-judgment relief, and it elected not to advance or support by appropriate procedure an alternative claim based upon alleged constitutional inadequacy of counsel.[4]

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4. Prudential now asserts, falsely, that "class counsel . . . conceded below that *they had done nothing* to investigate or evaluate the claims

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Armed at each of these stages with a panoply of rights as a class member and as prosecutor of its own causes of action, Prudential chose freely with the aid of sophisticated counsel. Upon careful review at each stage of the proceedings, the lower courts properly held Prudential bound by its choices.

These immutable and salient facts make *Fibreboard* beside the point here. The Petition is and remains devoid of merit and must be denied.

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of class members like Prudential." Supp. Memo. at 3 (original emphasis). However, Prudential's opening brief contradicts this latest misrepresentation. *See, e.g.*, Petition at 5, 8. No such concession exists on this record, nor could it, because the opposite is true concerning class counsel's substantial overall efforts in investigation, discovery, and estimation of defendants' liability and the magnitude of the class' claims in the aggregate. Insofar as class counsel's absence of knowledge about Prudential's federal lawsuit, it is immaterial here. The trial court specifically found that "even if plaintiffs' counsel and/or this Court had known of Pru's Newark lawsuits (which they did not) on July 24, 1996, it would not have caused us to reject the settlements on the ground of inadequacy." Petition at 52a.